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THOMAS J. HEALY, Administrator of the Estate of MICHAEL MORIARITY, Deceased, Appellee, vs. CHICAGO CITY RAILWAY COMPANY, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

196 I.A. 1

STATEMENT OF THE CASE.- This is an action brought by appellee (plaintiff below) against appellant, (defendant below) for damages on account of its alleged wrongful act in causing the death of Michael Moriarity, hereinafter referred to as the deceased.

The declaration consisted of six counts, all of which alleged that defendant was possessed of and operating a street railway on Halsted street in the city of Chicago, on September 17, 1911; that it was operating a car on said railway, south on Halsted street, at or near 43rd street; that deceased was riding as a passenger and was exercising due care and caution for his own safety; that by reason of the negligence of the defendant, as alleged in the various counts, he was thrown or brought in contact with a certain iron pole standing on the west side of the said Halsted street near its track, sustaining injuries from which he died. Each count also designated plaintiff as the duly appointed administrator of the deceased.

In the first count it is alleged that while deceased was riding as a passenger on the car in question, defendant so carelessly and improperly managed said car and caused it to run in such close proximity to the iron pole aforesaid, that

THOMAS J. HANLY, Administrator
of the Estate of MICHAEL MUR-
LANITY, Deceased,

Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF
COOK COUNTY.

1961 I.A.1

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The declaration consisted of six counts, all of which alleged that defendant was possessed of and operating a street railway on Halsted street in the city of Chicago, on October 17, 1911; that it was operating a car on said railway, north on Halsted street, at or near 63rd street; that deceased was riding on a passenger and was exercising due care and caution for his own safety; that by reason of the negligence of the defendant, as alleged in the various counts, he was thrown or brought in contact with a certain iron pole standing on the west side of the said Halsted street near its track, sustaining injuries from which he died. Each count also duly alleges plaintiff as the duly appointed administrator of his deceased.

In the first count it is alleged that while deceased was riding as a passenger on the car in question, defendant so negligently and improperly managed said car and caused it to run in such close proximity to the iron pole aforesaid, that

deceased was struck thereby and thrown to the ground, sustaining fatal injuries.

The second count alleged that while the deceased was in the act of becoming a passenger on the said car of the defendant, it negligently started said car without giving deceased a reasonable time to get on, by reason thereof he was struck by the iron pole.

The third count alleged that defendant managed, operated and controlled a certain wooden platform at or near the intersection of Halsted street with 43rd street, which said platform was between the west rail of the southbound track and the west curb of Halsted street and was used by the public, by and with the consent and at the invitation of defendant, as "a place whence to board and alight from the cars of defendant there"; that at the south end of said platform and in close proximity to said west rail there was an iron pole of which defendant had due notice; that it became the duty of defendant when it stopped its car at said platform to receive passengers not to start or drive said car past said iron pole until such passengers had boarded the car in safety and had reached a place on said car where they would not come in contact with said pole. The third count also alleged that plaintiff's intestate was boarding and getting on said car as a passenger from said platform. This count charged negligence in that defendant negligently and carelessly started the car and drove it past said post without giving plaintiff's intestate a reasonable time to board said car and reach a place of safety thereon, so that plaintiff's intestate as a result thereof was brought in contact with said pole.

deceased was struck thereby and thrown to the ground, sustaining fatal injuries.

The second count alleged that while the deceased was in the act of boarding a passenger on the said car of the defendant, it negligently started said car without giving deceased a reasonable time to get on, by reason whereof he was struck by the iron pole.

The third count alleged that defendant managed, operated and controlled a certain wooden platform at or near the intersection of Related street with 42nd street, which said platform was between the west rail of the southbound track and the west curb of Related street and was used by the public, by and with the consent and at the invitation of defendant, as "a place whence to board and alight from the cars of defendant there"; that at the south end of said platform and in close proximity to said west rail there was an iron pole of which defendant had due notice; that it became the duty of defendant when it stopped its car at said platform to receive passengers not to start or drive said car past said iron pole until such passengers had boarded the car in safety and had reached a place on said car where they would not come in contact with said pole. The third count also alleged that plaintiff's intestate was boarding and getting on said car as a passenger from said platform. This count charged negligence in that defendant negligently and wrongfully started the car and drove it past said pole without giving plaintiff's intestate a reasonable time to board said car and reach a place of safety thereon, so that plaintiff's intestate as a result thereof was brought in contact with said pole.

The fourth count was similar to the third, the only difference being that it alleged that deceased had already boarded the said car, while the third count averred the deceased was in the act of boarding it.

In the course of the trial the fifth count, which charged a failure to give warning of the proximity of the post in question to the track, was dismissed out of the case.

The sixth count set forth that defendant negligently permitted and allowed said iron post at the south end of the platform used by passengers to alight from and board cars to remain in such close proximity to the track that deceased, while riding as a passenger on said car, was struck by said post and fatally injured.

Defendant pleaded not guilty.

On the trial of the case, the jury awarded plaintiff a verdict, assessing the damages in the sum of $8,000 , upon which judgment was entered, to reverse which defendant has prosecuted this appeal.

The accident took place at the southwest corner of 43rd and south Halsted street on September 17, 1911, between nine and ten o'clock in the morning. Defendant had two tracks in Halsted street laid, as usual, in the center of the street. At the time of the accident the west track (i.e. the south-bound track) was being reconstructed. In fact, the old track had been torn out and defendant's cars were being operated in a southerly direction during the reconstruction period, on a temporary track laid on the west side of Halsted street. A plat and a photograph of the scene of the accident were offered in evidence by the plaintiff, and the locations and measure-

ments shown in these exhibits were not controverted. The west rail of the temporary track was 4.85 feet from the west curb line of Halsted street and was laid on ties and ballast on the unpaved surface of the street, making this temporary track higher above the surface of the unpaved portion of the street than the street car track laid on an ordinary paved street. This extra elevation brought the step of the car running along this temporary track an unusual distance from the ground; and to meet this situation, a wooden platform was built at the southwest corner of 43rd and Halsted streets to serve as the regular stopping place for the cars, which platform was on a level with the top of the rail of the temporary track. The north end of the platform began at a point about twenty feet south of the south curb line of 43rd street on the west side of Halsted street, and continued in a southerly direction between fifty and fifty-four feet, and covered the space between the west curb line and the west rail of the track,- a distance of 4.85 feet, and was long enough so that when a car stopped opposite it, there was room for persons to enter and alight from either end. Almost immediately next to the south end of this platform was an iron trolley pole. The distance from the pole to the temporary track was 3.65 feet. This pole was one of the permanent poles from which were suspended wires carrying the electric current used by the company in the operation of its cars.

The car involved in the accident was 45 feet 6 inches long and was of the type known as "pay-as-you-enter."

The platform of the car was 7 feet 6 inches wide, and the lower step of the platform was 52 inches in length

and divided in the center by a rod running from the floor of the platform to the roof of the vestibule. The step was 11 inches wide. The overhang of the car, from the inside rail of the temporary track, was 24½ inches, but the edge of the step extended one inch beyond; and as the space between the west rail and the pole was 3.66 feet, the distance between the edge of the step and the pole was between 19 and 20 inches. It was in this space of about 20 inches that the deceased was fatally injured.

MR. JUSTICE PAM delivered the opinion of the court.

It is not controverted that at the time of the accident the deceased was on the step of the car. One of the questions in issue was, how deceased got in the position on the step of the car so as to be struck by the post as the car passed it.

Defendant contends, first, that "the evidence shows that Moriarity jumped on the step of the moving car so short a time before it reached a point opposite the pole by which he was struck that it was not possible for defendant's employes to do anything to prevent the accident." Plaintiff contends, on the other hand, that while said car was standing still and deceased was in the act of boarding same and had begun to do so, defendant suddenly started it and drove it past said post, without giving the deceased a reasonable time to board said car and reach a place of safety.

Austin McInerney, a witness on behalf of the plaintiff, who was at the time of the accident standing on the corner where it occurred, testified that he saw the deceased on the east side of the southbound car as it came

to a halt at the southwest corner of 63rd and Halsted streets; that while the car was standing there, deceased walked around the rear end, got hold of the handrail, and was on the first step of the car when the conductor, standing in his usual place, facing north, signalled the motorman to start; that the car went ahead, and while deceased was in the act of getting on the second step the post struck him and he was thrown to the ground.

Another witness,- Edward Sutherland - testified that at the time of the accident he was walking south on Halsted street with one Dave Brady; that he first noticed the deceased when he (Sutherland) was about 50 feet north of the scene of the accident; that at that time the car was going very slowly and the south end of it was a few feet south of a fire plug located on the east side of the sidewalk and about opposite the north end of the temporary platform; that at that time deceased had both feet on the step, with his right hand grasping the iron rod in the center of the car platform, and the left on the handrail at the north end of the car; that there was a man on the rear platform of the car who was "stooping over with a box of some kind he had; * * * right off of the step, as you pay your nickel to get in," and that this man was in the way of the deceased and stopping him from getting on; that thereafter he saw deceased "get hit with the post."

The man Brady, with whom Sutherland had been walking, testified that he did not see deceased until his attention was called to the accident by a cry from Sutherland; that as he looked up he saw deceased who was standing on the step of the car, struck by the post.

Another witness, a boy named Sam Shapiro, testified that the deceased was on the step of the car just before being hit by the post.

Defendant, on its behalf, offered the testimony of Matthew Cuchalik, who was a passenger on the car in question and who was riding on the rear platform at the time of the accident. He testified that when the car stopped at 43rd street, there was only one person waiting to get on; that this person was a man named Max Kraft, a carpenter; that he (Kraft) had with him a tool chest and some blueprints or plans; that after Kraft had boarded the car it started; that the carpenter placed his tool chest on the car platform; that the conductor signalled for the car to start; that after the car had proceeded 50 or 60 feet, someone (who afterwards proved to be the deceased) got on the car and grasped the hand rail on the north end of the platform and at the same time he heard a crash right against the post; that at the time this man tried to board the car he was about four or five feet from the post.

The carpenter, Max Kraft, was also a witness. He testified that he was the only person waiting to board the car when it stopped; that after the car stopped, he deposited his tool chest in the corner, turned around to pay his fare, and as he was about to do so he saw the deceased jump on the car, and at almost the same moment struck by the post; that when the deceased jumped on the car he was about two or three feet from the post.

Matthew Gleason, the motorman of the car in question, testifying on behalf of the defendant, stated that when his car approached 43rd street he saw only one passenger waiting at the corner in question; that he got the signal to proceed, and after having gone about 50 feet he received the emergency signal to stop; that at that time the car was going

about six or eight miles per hour; and that he brought it to a stop within about 60 feet, after which he learned of the accident.

Defendant also offered the testimony of Wilmon H. Ueberaut, a stenographer, with reference to a statement made by Sutherland while being interrogated in the office of Defendant's attorney, which statement it is alleged impeached his testimony.

The conductor who had charge of the car in question did not testify, but his absence was accounted for.

Clearly, this conflicting evidence presented a question of fact for the jury. The jury by their verdict evidently believed the testimony offered on behalf of the plaintiff. Defendant, however, insists that the verdict is clearly and manifestly against the weight of the evidence, and in support thereof asserts that only by one witness (Kelmerney) has plaintiff shown that the deceased attempted to board the car while it was standing still, and that his testimony was indefinite on direct, and that it was weakened on cross examination. We cannot subscribe to the contention that plaintiff relied solely for his theory of the case upon the testimony of Kelmerney. The witness Sutherland testified that when he saw the deceased, the car was just south of the fire plug and it was going slowly. This fire plug was 50 or 60 feet from the post. When he saw the deceased, the latter was already on the car. Defendant's witness Kruft testified that the car was just a few feet south of the fire plug when it stopped, so that when Suther-

land stated that he saw deceased on the step of the car just a few feet south of the fire plug, the jury may well have concluded that when Sutherland saw deceased there it was immediately after the car had started; furthermore, the jury may well have also concluded that Sutherland's testimony corroborated the testimony of McInerney, that the deceased attempted to board the car in question while it was standing still.

Sutherland also testified that when he saw deceased on the step of the car, there was a man (presumably Kraft) stooping over, placing a box he carried, on the platform, thereby obstructing the passageway and preventing deceased from entering the car. The testimony for the defendant showed that Kraft, as he boarded the car, carried a tool chest and placed it on the platform. This circumstance may have been considered by the jury as accounting for the failure of deceased to get into a place of safety before the car reached the post in question.

There is no evidence that deceased knew of the proximity of this post to the track, but the jury had the right to assume that as defendant was constructing a new track, its servants did have, or should have had, knowledge of the proximity of the temporary track to the post that caused the fatal injury.

The credibility of the witnesses and the weight to be attached to their testimony, is always to be determined by the jury. The jury saw and heard these witnesses, and it is within their province to determine which were the more worthy of belief. Furthermore, the trial judge, who also had an opportunity to hear and see the witnesses, approved

the finding of the jury on this issue. Unless we can say that such finding is clearly and manifestly against the weight of the evidence, we cannot disturb it. This we are unable to say.

In this view of the case, we cannot concur in the further contentions of the defendant, that "the evidence failed to establish that plaintiff was a passenger at the time of the accident," and that " recovery is barred by contributory negligence," as these were also questions of fact which the jury by their verdict have determined in favor of the plaintiff.

Defendant further contends that in connection with the cross examination of the witness McInerney "the trial judge made improper statements and improperly interfered with the cross examination, to the great prejudice of defendant."

As heretofore stated, the record shows that McInerney, on direct examination, testified that deceased, at the time the car arrived at the stopping place at the southwest corner of 43rd and Halsted streets, was on the east side of the car; that he went around the rear end of the car over the cross walk, onto the temporary platform; and that while the car was standing there, took hold of and attempted to board it; that thereupon the conductor signalled for the car to proceed; that while deceased was endeavoring to reach the second step, he was struck by the post.

At the trial

After a somewhat lengthy cross examination, counsel for defendant asked the following question:

of a witness

"What he was doing between the time that you saw him east of the track on the ground and the time he fell you did not notice, did you?"

to this the witness answered, "No, I did not." Objection was made to the question, on the ground that it contained an unfair statement. The question was then re-read, and the court said, "He has stated it altogether differently, Mr. Hussey;" to which remark of the court counsel for defendant excepted. The court then interrogated the witness further on the same point, which questions were not objected to. The court then asked counsel for defendant whether he wished to ask anything further and he replied in the negative.

As we look upon this circumstance, there was nothing in the remark of the court which was not borne out by the record, and counsel can not controvert the fact that the witness had made a statement different from that contained in the question propounded. Furthermore, the question contained a positive assertion rather than a query, and was in the form of a contradiction of the witness. Such questions are objectionable. 40 Cyc. 2517.

It was but natural for the court to make such statement. When counsel objected and took exception to the court's remark the court may have concluded that counsel took issue with him as to whether or not the court correctly remembered the witness's testimony, and therefore interrogated the witness further. While this further questioning on the part of the court is assigned as error, no objection was interposed at the time to this further examination by the court,

and the record shows that the court did not preclude counsel from further examination.

The action of the court, both as to the statements made, and the further interrogation of the witness, was but a just and reasonable exercise of its judicial function. Wigmore on Evidence, Vol. 1. Sec. 784. We have no reason tobelieve from the record in this case, that either the remarks made or the questions asked by the court in any way influenced the jury to the prejudice of the defendant.

A similar situation arose in Leighton v. Chicago Consolidated Traction Co., 235 Ill. 235, and in passing upon this point, the court said (p.235:)

> "Appellant contends that the court erred in refusing to permit the witness Nihe to answer certain questions. He was examined at great length as to where he saw the shadow with reference to the cars, and his testimony is not in entire harmony on this point. During his direct examination counsel for the appellant asked this question: 'What, if anything, did you see come from between the cars there?' On objection being made the court said: 'I sustain the objection. The witness, as I understand it, has testified to seeing a shadow, but not in the manner which your question reads.' Counsel then said that he disagreed with the court as to what the witness said, and the court continued: 'My recollection is different from yours, and in order to avoid any difficulty change your question.' The question was changed and the court permitted the whole subject to be gone into again. Counsel now insist that this statement of the court quoted above tended to mislead the jury. We see nothing improper in the judge's statements."

Defendant further complains of the instructions given on behalf of the plaintiff, and of one refused on behalf of itself. There were sixteen instructions submitted to the

jury on behalf of the defendant, and six for the plaintiff. We have carefully read same, and believe the jury were fairly and properly instructed as to the law governing the issues involved.

The refused instruction was number five. Part of the subject-matter of this instruction was covered by instructions 26 and 27 given on behalf of the defendant. The other part, which reads as follows:

> "The jury are instructed, as a matter of law, that in causes of this nature the mere fact of the accident itself alone, if you believe from the evidence it occurred, is not necessarily evidence of negligence on the part of the defendant,***"

was clearly objectionable in that it singled out one item of evidence and stated that a certain conclusion would not necessarily follow therefrom. Such an instruction is misleading and confusing, and it was therefore properly refused. West Chicago St. R.R. Co. v. Potters, 196 Ill. 298.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

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vs.

JOHN F. WATTS,

Defendant in Error,

vs.

UNIVERSAL STORE SPECIALTIES CO.,
a Corporation,

Plaintiff in Error

ERROR TO
MUNICIPAL COURT
OF CHICAGO

196 I.A. 3

STATEMENT OF THE CASE.-Defendant in error (plaintiff below) recovered a judgment for $215.00 against plaintiff in error (defendant below) who by this writ of error seeks to have that judgment reversed.

Plaintiff's cause of action is based on a written contract of employment with defendant wherein the latter agreed, among other things, to advance to plaintiff the sum of $50.00 per week for a period of one year. This contract is dated May 28, 1913, and plaintiff's claim is for nine weeks' advances ($450.00) less a credit of $235.00, being moneys due defendant from customers, which moneys plaintiff had collected and retained.

While defendant in its affidavit of merits sets forth several defenses, yet upon the trial of the case the principal defense relied on was that plaintiff had not given a bond as required by the contract, but in lieu thereof had entered into a new contract of employment which superseded the written one.

MR. JUSTICE FAY delivered the opinion of the court:

The only evidence offered on behalf of the plaintiff was the contract itself, and plaintiff's testimony that he had not received advances from defendant for a period of

nine weeks, and that there was due him under said contract for advances, the sum of $450; that he had collected moneys due defendant to the extent of $235, for which he had given it credit, leaving a balance due of $215.

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It appeared, on examination of plaintiff under section 88 of the Municipal Court Act, and from the testimony of H. F. Dugan, district sales manager of the defendant, that plaintiff had received in advances considerably more money than was earned by him in commissions under the contract of employment; that shortly after October 31, 1913, in a conversation with plaintiff, Dugan read to plaintiff a letter which he had received from defendant, which letter was as follows:

> "With regard to Mr. Waters, his account has been speedily going behind, as you know, and the statement for the last week shows a net overdraft, or difference between overdraft and prospective, of $460.00. We wish you would have a talk with Mr. Waters and endeavor to show him that we cannot possibly keep remitting him $60 per week unless he does business to warrant our doing so. When the writer saw him, and in his correspondence about September 1st, he told of a great many sales that he surely could close during September, or soon, and these sales have not matured. If they had, no doubt his account would be in different shape. If he will consent to having his remittance reduced to an amount that he can earn, we will continue with him, but if not, we shall certainly have to cut him off the remittance list. In his application he states that he can give a personal bond, signed by two owners of real estate. If he can furnish such a bond that will protect us against loss by making him the advances that we have agreed to make against his commissions, we will be willing to go along with him, but we cannot take a chance of losing any money on his account;"

that at said conversation he requested plaintiff to furnish a bond as required under section 8 of the contract and in accordance with the letter above quoted. Plaintiff testified that Dugan stated to him that the company might want him to give a bond.

Dugan testified that plaintiff stated he would not give a bond; that upon the refusal of plaintiff to give a bond, he informed plaintiff that defendant would make no further advances to him but that if he wished to continue selling goods on the same commission, defendant would advance him 60% on commissions earned, and apply the remaining 40% on the indebtedness due defendant; that plaintiff stated that he was satisfied but that he wanted him (Dugan) to write defendant a letter for him, asking the company to advance 60% of his earned commissions, and apply the remainder (35%) on the indebtedness due from him to the defendant.

Plaintiff did not deny that these terms were discussed, but insists that he refused to accept the proposition; admitting, however, that he asked Dugan to write defendant a letter requesting that he be allowed to draw 60% instead of only 50% of his earned commissions.

The testimony further discloses that thereafter plaintiff sent in two orders on which his commission amounted to $60.30; that shortly thereafter he telegraphed defendant as follows:

"He sings of war commissions last week $80;"

that after sending this telegram, he received a check from Dugan for $48.18 - exactly 80% of the commissions earned by him; that this was the last business transaction plaintiff reported to the defendant. The evidence further disclosed that on November 14, 1913 plaintiff received the following letter in response to one he had written defendant on the 12th:

"I have received your personal letter of the 12th inst. and as before you receive this you will have received the remittance sent you yesterday, no doubt financial matters will be all satisfactory. I believe that you may possibly work a little harder on a straight commission basis, and if you do, I feel sure

> that you will get in enough orders so that you will make more money than you did on the basis of a regular weekly remittance. I appreciate the difficulties you have had on account of competition you have had but it is no worse in Chicago than it is in New York and many other sections, and so long as we have so many superior features on our machines and the right sort of salesmen to present these features to the merchants, I am convinced that we will get our share of the business. I suppose the company cannot afford to pay more than its regular percentage for getting business, and naturally a badly overdrawn account is discouraging here, and calls for some action to head off a possible loss."

Upon this evidence the court found the issues for the plaintiff.

We are of the opinion that the court's finding is clearly and manifestly against the weight of the evidence. There was no denial by plaintiff that he had received moneys far in excess of his earned commissions; there is no question, from the evidence, that therefore defendant asked for the bond, as provided for in section 9 of the contract, which was as follows:

> "The Sales Agent shall furnish to the Company, if required, at the time of executing this agreement or thereafter, a satisfactory bond of indemnity for a prompt and faithful accounting to the Company of all property loaned him, and the payment to the Company of all his indebtedness, including advances of money and any other loss or liability that may be sustained by the Company by reason of having employed said Sales Agent."

Plaintiff did not deny that a bond was asked for, and was silent on the question whether or not he refused to furnish one. Fagan, however, testified categorically that plaintiff refused to furnish a bond, and that thereupon the new agreement was entered into. However, notwithstanding plaintiff's denial of his acquiescence in the new agreement whereby he was to receive 5% of his earned commissions and the remainder (85%) to be applied on his indebtedness, the fact remains that upon the business done by him thereafter

he received his compensation on the basis of the new arrangement and made no objection thereto; that, on the contrary, he telegraphed defendant, "Co sinews of war commissions last week $xx," - indicating that he had accepted the new arrangement and was claiming his share of the commissions thereunder. (1)

All these facts are so inconsistent with plaintiff's theory of the case, that we must hold that the trial court erred in its finding for the plaintiff. The judgment will, therefore, be reversed and the cause remanded.

REVERSED AND REMANDED.

835 - 20973.

THORA L. RATHMANN, Appellee,	)	APPEAL FROM
vs.	)	SUPERIOR COURT
CHARLES H. RATHMANN, Appellant.	)	COOK COUNTY.

196 I.A. 26

STATEMENT OF THE CASE. This is a bill for separate maintenance brought by Thora L. Rathmann, appellee, (complainant below) against Charles H. Rathmann, appellant, (defendant below). The decree for separate maintenance is based upon the charge of extreme and repeated cruelty, and that at the time of the decree she was living separate and apart from her husband without her fault. The decree further directed that complainant be allowed the use and occupancy of the dwelling house owned by defendant, - then occupied by complainant and her minor children as well as by the defendant, - together with all personal property, goods, chattels and effects contained therein: that she also be allowed the use of the building used by defendant as a garage, and $75 per month alimony: it also awarded to complainant the custody of the two children, and further ordered said defendant to vacate the room occupied by him in said dwelling house and that he move therefrom. From this decree defendant has prosecuted this appeal.

In urging a reversal of the decree, defendant does not question the finding of the court as to the charge of cruelty, nor as to the amount of alimony allowed. He contends that, the decree is erroneous because: (1) the record in the case is barren of any evidence tending to show that at the time of the filing of this bill by complainant she was living separate and apart from defendant: (2) the bill upon which the decree is based contains no allegation that at that time the parties were living separate and apart; and (3) the decree contains no finding that at the time the bill was filed the parties were living separate and apart.

[illegible] - DOWNS.

[illegible] L. [illegible], Appellee.

vs.

[illegible] A. [illegible], Appellant.

[illegible] 1928 I.A. 20

Statement by the Court: In a bill for divorce maintained by Jones -- [illegible], Independent Judgment against Martha A. Downs, appellant, [illegible] radio. The Downs [illegible] separate maintenance in which [illegible] and separate maintenance, but that at the time of the [illegible] and apart from her husband without her fault. The Jones [illegible] dismissed the complaint in chief and [illegible] the decree [illegible] - that separate [illegible] and separate maintenance as well as by the defendant, - [illegible] personal property, goods, chattels and effects [illegible] that she also be allowed the use of the building used by defendant as a garage, and $75 per month alimony; it also awarded [illegible] with the warranty of the [illegible]. The further evidence will [illegible] to remove the room occupied by him in said dwelling house, and that [illegible] appeal.

In urging a reversal of the decree, defendant does not question the finding of the court as to the charge of cruelty, nor as to the amount of alimony allowed. Its contention is that, the decree is erroneous because: (1) the record in the case is barren of any evidence tending to show that at the time of the filing of this bill by complainant she was living separate and apart from defendant; (2) the bill upon which the decree is based contains no allegation that at that time the parties were living separate and apart; and (3) the decree contains no finding that at the time the bill was filed the parties were living separate and apart.

MR. JUSTICE PAM delivered the opinion of the court.

Complainant's bill was filed in June, 1915, wherein it was alleged that she was married to defendant in December, 1907; that she continued to cohabit with him until May 10, 1913; that they had two children, one five years old and the other 18 months; that complainant discharged her duties as wife while she lived with defendant, but that defendant, a short time after marriage, commenced a course of cruel, unkind and inhuman conduct toward her, which continued until on or about May 10, 1913, at which time she was compelled to cease her relation with defendant as a wife, although she continued to live under the same roof; that because of defendant's extreme and repeated cruelty it is unsafe and improper for her and the children to live with him.

The questions raised by defendant are: (1) Do these allegations constitute a charge that the parties were living separate and apart at the time the bill was filed through no fault of the complainant, and (2) was there evidence tending to support such allegation if such allegation could be held to sustain the decree of separate maintenance?

Complainant by her testimony showed that she and the defendant had been living as husband and wife in said dwelling house up to May 10, 1913; that thereafter, because of alleged inhuman treatment on his part she ceased sustaining the marital relationship with him, although continuing to live under the same roof, each occupying a separate room. While the bill charges failure to properly support complainant, the record is barren of any evidence tending to show that complainant was ever without the necessaries of life. The evidence shows that at the time the bill was filed she was living in a home provided by the defendant, and one deemed suitable for them to live in. While there was some dispute as to whether or not the support given her by defendant was suitable and adequate to their condition in life, yet she had the necessaries of life and had the service of a maid up

to the time said bill was filed. The only evidence that complainant and defendant were living separate and apart, was the testimony that from May 10th, when the complainant ceased living with him as his wife because of cruelty, to June 10th, the date of the filing of her bill for separate maintenance, the complainant and defendant, while living under the same roof, occupied separate rooms. The record is barren, however, of any evidence as to whether or not during this period the parties ate at the same table or met in the family living room or that in any way the relationship was changed, save the fact that they did not occupy the same room. While there is much evidence in the record with reference to their marital relations prior to the filing of this bill, affecting the charge of cruelty, yet the decree cannot stand unless it appears reasonably as a fact from the evidence that at the time of the filing of the bill the parties were actually living separate and apart. The facts in evidence do not justify such a finding in the decree. Fountain v. Fountain, 23 Ill. App. 529; Will v. Will, 134 Ill. App. 67; Smith v. Smith, 156 Ill. App. 176.

Defendant further contends that the bill contained no allegation that the parties were living separate and apart at the time it was filed. While the said allegations are not clearly stated, yet in the absence of a special demurrer we deem them sufficient.

Taking the view, however, that we have of the evidence in the case, the decree must be reversed and the cause remanded.

REVERSED AND REMANDED.

865 - 21003.

SIEGMUND ROESNER, Appellee,	)	APPEAL FROM
vs.	)	COUNTY COURT
C. E. DELLENBARGER COMPANY, Appellant.	)	COOK COUNTY.

196 I.A. 23

STATEMENT OF THE CASE. By this appeal it is sought by appellant (defendant below) to reverse a judgment for $400 in favor of appellee (plaintiff below) on the following contract of employment:

"Chicago, Ill., Oct. 16, 1912.

"Know all Men by these Presents, that C. E. Dellenbarger Company, a corporation, hereinafter called first party, and Siegmund Roesner, hereinafter called second party, both of Chicago, Cook County, Illinois, entered into the following agreement, this 15th day of October, 1912:

"First party agrees to hire the services of second party for the period of one year, beginning on the 15th day of October, 1912, and ending on the 14th day of October, 1913, for the following purposes:

"(1) Second party is to work in the machine shop of first party, and do all mechanical work, such as experimental, model, tool and die, and all work required by the trade of the company, in a first-class manner and workmanship.

"(2) If so directed by first party, second party is to superintend the work done in the shop of first party, and take charge of the working force.

"(3) Second party is to use his best knowledge and ability in discharging the duties assigned to him by first party.

"(4) In consideration of the foregoing, first party agrees to pay the second party the sum of Eighteen Hundred and fifty ($1850.00) dollars per annum, payable in weekly installments, as follows:

"$30.00 per week for each and every week, for a period covering the first three months, beginning on the 15th day of October, 1912; thereafter, $35.00 per week for each and every week, for a period covering the second three months, beginning on the 15th of January, 1913, and $37.50 per week for every week for the remainder of six months of this contract, beginning on the 15th day of April, 1913.

(signed) C. E. DELLENBARGER CO.,
by C. E. Dellenbarger, Pres.

S. ROESNER."

The evidence shows that plaintiff entered upon the employment immediately after the making of said contract, and continued

IN THE COURT OF APPEAL.

Appellant,

-v-

Respondent.

Appeal from the judgment of the Supreme Court of Ontario (Mulock C.J.O., Meredith, Magee, Hodgins and Garrow JJ.A.) dated the 19th day of October, 1916.

"BETWEEN: JOHN, THE 19th DAY OF OCTOBER, 1916.

"THIS ALL THAT IS THERE PRESENTS, THAT: [illegible] BURGER INDUSTRY, a corporation, hereinafter called first party, and [illegible] HOUSE, hereinafter called second party, [illegible] CITIZENS, witness with the following agreement, this 19th day of October, 1916:

"First party agrees to hire the services of second party for the period of one year, beginning on the 19th day of October, 1916, and ending on the 19th day of October, 1917, for the following purposes:

"(1) Second party is to work in the machine shop of first party, and do all mechanical work, both of experimental, metal, tool and die, and all work required in the tools of the company, in a first-class manner and workmanship.

"(2) If so directed by first party, second party is to superintend the work done in the shop of first party, and take charge of the working force.

"(3) Second party is to use his best knowledge and ability in discharging the duties assigned to him by first party.

"(4) In consideration of the foregoing, first party agrees to pay the second party the sum of fifteen hundred and fifty ($1,550.00) dollars per annum, payable in equal instalments, as follows:

"$30.00 per week for each and every week, for a period [illegible] the first three months, beginning on the 19th day of October, 1916; thereafter, $25.00 per week for each and every week, for a period covering the second three months, beginning on the 19th of January, 1917, and $27.50 per week for every week for the remainder of six months of this contract, beginning on the 19th day of April, 1917.

(signed) S. S. [illegible]
by S. S. Belisle, Pres.

S. BURGER."

The evidence shows that plaintiff commenced upon the employment immediately after the making of such contract, and continued

until August 20, 1913, when he was discharged by the defendant; that plaintiff received during that period, the sum of $1350 from the defendant.

MR. JUSTICE PAM delivered the opinion of the court.

The principal issue was, whether or not there were sufficient grounds justifying the discharge of the plaintiff before the expiration of the year for which he had been employed. On this issue there was only one witness for the plaintiff and that was the plaintiff himself, who testified that during the time he was working under said contract he in every respect complied with the terms thereof; that on the 20th day of August, 1913, he was discharged by the president of defendant, without cause; that thereafter he sought employment elsewhere during the remainder of the term of the contract, but without success.

Defendant, by three witnesses, offered testimony tending to show that plaintiff had repeatedly failed to comply with directions given him by his superiors as to the manner in which to perform his work, wherefore he was discharged. Plaintiff, however, denied ever having received any such directions, save at the time he was discharged. Defendant contends that it was necessary for plaintiff to prove this issue by a preponderance of the evidence. While on this issue there was only one witness for the plaintiff and three for the defendant, yet the number of witnesses testifying on each side is not absolutely controlling but is a proper element to be considered by the jury in weighing the evidence. The credibility of the witnesses and the weight to be attached to their testimony is always to be determined by the jury. The jury saw and heard these witnesses, and it is within their province to determine which were the more worthy of belief. Furthermore, the trial judge, who also had an opportunity to hear and see the witnesses, approved the finding of the jury on this issue. Unless we can say that such finding is clearly and manifestly

[illegible] denied, if it, upon be was directed to the defendant; [illegible] plaintiff received during that period, the sum of [illegible] the defendant.

7. Motion for delivery the property of the jury.

The principal issue was, whether or not there was sufficient evidence justifying the transfer of the plaintiff before the expiration of the year for which he had been employed. In this issue there was only one witness for the plaintiff and that was the plaintiff himself, who testified that during his stay he was working under contract to be in every respect complied with the terms thereof; that on the 20th day of August, 1878, he was discharged by the president of defendant, without cause; that thereafter he sought employment elsewhere during the remainder of the contract, but failed to obtain work.

Defendant, by three witnesses, offered testimony tending to show that plaintiff had repeatedly failed to execute his directions; that his superiors as to the manner in which to perform his work, admitted he was discharged. Plaintiff, however, denied ever having received any such directions, even at the time he was discharged. Defendant contends that it was necessary for plaintiff to prove this issue by a preponderance of the evidence. While on this issue there was only one witness for the plaintiff and three for the defendant, yet the number of witnesses testifying on each side is not absolutely controlling, for it is proper evidence to be considered by the jury in weighing the evidence. The credibility of the witnesses and the weight to be attached to their testimony is always to be determined by the jury. The jury has not been there witnesses, and it is within their province to determine which are the more worthy of belief. Furthermore, the trial judge, who did not in reversibly in chief and the witnesses, approved the finding of the jury on this issue. Unless we can say that such finding is clearly and manifestly

Healea v. Keenan, 244 Ill. 484

against the weight of the evidence, we cannot disturb it./ This we are unable to say. xxxxxxxxxxxxxxxxxxxxxxxxxxxx.

Defendant contends that a new trial should have been granted on the ground of newly discovered evidence affecting the question of damages. Such motion for a new trial must be supported by the affidavits of the witnesses by whom it is proposed to prove the matters relied upon, or some excuse must be shown for not producing them. C. C. Ry. Co. v. Bohnow, 108 Ill. App. 346; Cowan v. Smith, 35 Ill. 417. Defendant did not secure the affidavit of the witness by whom it expected to prove the alleged newly discovered evidence because, as stated in the affidavit of C. E. Dellenbarger, said witness was "an extremely busy physician and surgeon," who, according to Dellenbarger's affidavit, volunteered this newly discovered information to defendant immediately after the trial, said witness having since departed from Chicago on an extended journey to be gone for some time. What efforts defendant put forth to procure said affidavit before his departure on his "extended journey" are not stated in Dellenbarger's affidavit beyond the allegation that Dellenbarger had made "earnest efforts" to secure said affidavit. Nor does the affiant indicate what efforts were made to learn of this newly discovered evidence prior to or during the trial. He makes the general statement that "diligent efforts were made by this affiant to discover evidence of this character," etc. These statements were mere conclusions of the affiant, and gave the court no information from which to determine whether or not he was diligent. In the absence of such facts, the court properly overruled defendant's motion for a new trial. C. & A. R.R. Co. v. Raidy, 203 Ill. 310.

The verdict of the jury is based upon the provisions of the contract whereby the plaintiff was to receive $30 per week for the first three months, $35 the second three months, and $37.50 during the last six months. Defendant contends, however, that there had been a modification of the contract whereby plaintiff's salary was to con-

Ilesies v. Keenan, 244 Ill. 484

against the weight of his evidence, or cannot insert it. Ill. v. [illegible] in ex. [illegible]

Defendants contends that a new trial should have been granted on the ground of newly discovered evidence affecting the question of damages. Such motion for a new trial must be supported by the affidavits of the witnesses by whom it is proposed to prove the matters relied upon, or some excuse must be given for not producing them. [illegible] v. [illegible], 181 Ill. App. 1[illegible]. [illegible] v. [illegible], 1[illegible] Ill. 1[illegible]. Defendant did not always the affidavit of the witness he was expected to prove the alleged newly discovered evidence bearing, as stated in the affidavit of G. A. Dallmayer, said witness was "an extremely busy physician and surgeon," who, according to Dallmayer's affidavit, volunteered this newly discovered information to defendant immediately after the trial, said witness having since departed from Chicago on an extended journey to be gone for some time. Such efforts defendants put forth to procure said affidavit before the departure of the "extended journey" are not stated in Dallmayer's affidavit. Added the allegation that Dallmayer had made "diligent efforts" to secure said affidavit. Nor does the affidavit indicate what efforts were made to learn of this newly discovered evidence prior to or during the trial. He makes the general statement that "diligent efforts were made by this affiant to discover evidence of this character," etc. These statements were mere conclusions of the affiant, and gave the court no information from which to determine whether or not he was diligent. In the absence of such facts, the court properly overruled defendant's motion for a new trial. [illegible] v. [illegible], [illegible] Ill. 310.

The verdict of the jury is based upon the provisions of the contract whereby the plaintiff was to receive $[illegible] per week for the first three months, $[illegible] the second three months, and $[illegible] during the last six months. Defendant contends, however, that there had been a modification of the contract whereby plaintiff's salary was to con-

time at $30 per week throughout the entire term thereof, and that therefore, even though the plaintiff was entitled to recover, the amount allowed was excessive.

The evidence discloses that the plaintiff did not receive the increase in salary to which he was entitled during the second three-months' period or that to which he was entitled during the final six-months' period, up to the time of his discharge, but that he continued in defendant's employ at a salary of $30 per week. The evidence further shows that plaintiff, after the first three months, told Dellenberger, president of the defendant, that under the contract he was entitled to $35 per week and was informed that the omission was due to an oversight, that during the following week when he again spoke of the matter he received a like answer, and that a week later when plaintiff spoke of the matter for the third time, Dellenberger answered, "you are not suffering any."

On behalf of the defendant, Dellenberger testified that at the end of the first three months, when plaintiff complained of receiving a check for only $30 instead of $35, he (Dellenberger) said: "It is much more than you are worth and I do not like paying you any more; I do not feel like paying you any more and you will receive that;" that there was nothing further said, and plaintiff received a check for $30 every week thereafter until the end of his services. This sharp conflict in the evidence presented a question of fact for the jury as to whether or not the plaintiff acquiesced in the actual modification claimed by the defendant, which issue was also determined favorably to the plaintiff, and we cannot say that such finding is clearly and manifestly against the weight of the evidence.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

49 - 20211.

CITY OF CHICAGO, Defendant in Error, vs. CHARLES LEISER, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

196 I.A. 37

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This is an action to recover a penalty for a violation of a city ordinance. There was a written waiver of trial by jury, cause was heard by the court, and a fine of two hundred dollars imposed upon defendant. He was also ordered to pay the costs assessed at eight dollars and fifty cents. He asks a reversal on the following grounds:

1. Because the plaintiff failed to introduce in evidence the section of the ordinance of which violation was alleged in complaint, and failed to make any proof that the alleged ordinance was in force at the time the act complained of was committed.

2. That the finding of the court is manifestly against the weight of the evidence.

The complaint charged that the defendant on the eighth day of December A. D. 1913, at the City of Chicago aforesaid, then and there being interested in, owning, keeping, managing and maintaining a certain common gaming house in the City of Chicago, which said place was then and there kept for the purpose of gaming and gambling for money and other valuables and things in violation of section 977 of the Chicago Code of 1911.

As to the first contention of defendant, this court

CITY OF CHICAGO,
Defendant in Error,

vs.

MICHAEL LEGINS,
Plaintiff in Error.

MR. JUSTICE MORGANTHAU DELIVERED THE OPINION OF THE COURT.

This is an action to recover a penalty for a violation of a city ordinance. There was a written waiver of trial by jury, cause was heard by the court, and a fine of ten thousand dollars imposed upon defendant. He was also ordered to pay the costs assessed at eight dollars and fifty cents. He asks a reversal on the following grounds:

1. Because the plaintiff failed to introduce in evidence the section of the ordinance or which violent on was alleged in complaint, and failed to show any proof that the alleged ordinance was in force at the time the act complained of was committed.

2. That the finding of the court is manifestly against the weight of the evidence.

The complaint charged that the defendant on the eighth day of December A. D. 1922, at the City of Chicago aforesaid, then and there being interested in, owning, managing and maintaining a certain common gaming house in the City of Chicago, which said place was then and there kept for the purpose of gaming and gambling for money and other valuables and things in violation of section 277 of the Chicago Code of 1922.

As to the first contention of defendant, this court

held in the case of City of Chicago v. Baranov, 189 Ill. App. 25, that, "a complaint charging defendant with violating a city ordinance, sufficiently describes the offense and the ordinance violated, where the ordinance was described by the number of the section of the Municipal Code, and the acts he was charged with doing were also specifically set forth. In the case of City of Chicago v. Moran, 192 Ill. App. 57, which also was a suit in the Municipal Court to recover a penalty for the violation of a city ordinance, the ordinance in question was referred to by number, only, in the complaint, and was not offered in evidence nor read to the court, so far as the record in that case discloses. This court in that case said, "Section 54 of the Municipal Court Act, requires the trial court to take judicial notice of all general ordinances of the City of Chicago, and as the record before us fails to show that he did not do so, we must presume that he did. * * * City of Chicago v. Tearney, 187 Ill. App. 441. We must assume, therefore, that the trial court was justified in finding that the proof in this case showed a violation by the plaintiff in error, of Section 1539, as charged in the complaint in this case."

3371

This court will not take judicial notice of city ordinances. To be availed of on review they must be preserved by bill of exceptions. City of Chicago v. Perkinson, 189 Ill. App. 630; City of Chicago v. Tearney, supra, and cases there cited.

As the record before us does not disclose the contrary, this court will presume that the trial court took judicial notice of the section of the City Code in question, as that court is required to do by section 54 of the Municipal Court Act. A suit to recover a penalty for the violation of a city ordinance is a civil suit. The complaint stands as a statement of the plaintiff's claim, and if the complaint

held in the case of City of Atlanta v. Harmony, 209 Ill. App. 22, that, "a complaint charging defendant with violating a city ordinance, and illegally exercise the offense and the ordinance violated, where the ordinance was repealed by the passage of the section of the municipal code, and the suit be was obliged with being more also (specifically) not right. In the case of City of Chicago v. Weiss, 164 Ill. App. 37, which also was a suit in the municipal court to recover a penalty for the violation of a city ordinance, the ordinance in question was repealed by number, only, in the complaint, and was not affected in substance nor need in this event, so far as the penalty in that case is concerned. This court in that case said, "Section 31 of the municipal court act, requires the trial court to take judicial notice of all general ordinances of the City of Chicago, and as the record before us fails to show that he did not do so, we must presume that he did. . . . City of Chicago v. Thomas, 147 Ill. App. 412. To most lawyers, therefore, that the trial court was justified in finding that the proof in this case showed a violation by the plaintiff in error, of section 1254, as charged in the complaint in this case."

This court will not take judicial notice of city ordinances. To be available of on review they must be presented by bill of exceptions. City of Chicago v. Tarkington, 149 Ill. App. 650; City of Chicago v. Thomas, supra, and cases therein cited.

As the record before us does not disclose the contents, this court will presume that the trial court took judicial notice of the section of the City Code in question, as that court is required to do by section 31 of the municipal court act. A suit to recover a penalty for the violation of a city ordinance is a civil suit. The complaint stands as a statement of the plaintiff's claim, and if the complaint

in the instant case was not definite enough to suit the defendant, he should have moved for a rule on plaintiff to file a more specific statement as in other cases of the fourth and fifth class under the Municipal Court Act. City of Chicago v. Williams, 254 Ill. 360, 365. The acts the defendant is charged with doing, which were said to be in violation of said section of the Chicago Code, are also specifically set forth in the complaint.

After a careful review of the evidence in this case, this court is unable to say that the finding of the trial court is manifestly against the weight of the evidence. No error is apparent from the record presented here and the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

48 - 20210

CITY OF CHICAGO,
Defendant in Error,

vs.

OTTO COORTH,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

The defendant, Otto Coorth, plaintiff in error here, was found guilty in the Municipal Court of Chicago of violation of Section 2012 of the Chicago Code of 1911. Judgment was entered on the finding. The complaint charged that the defendant on December 13, 1913, at the City of Chicago, was found in a gambling house, to give a reasonable excuse for being so found, in violation of Section 2012 of the Chicago Code of 1911. The complaint is a printed form, and following the words "gambling house," a line was drawn through certain printed words including the following, "and was unable." It is apparent that these words were stricken out by inadvertence. He asks a reversal on the following grounds:

1. Because the plaintiff failed to introduce in evidence the section of the ordinance of which violation was alleged in complaint, and failed to make any proof that the alleged ordinance was in force at the time the act complained of was committed.

2. That the finding of the court is manifestly against the weight of the evidence.

This case and the case of City of Chicago v. Charles Lesser, #20211, were tried together in the lower court, and by order of this court the two writs of error were consolidated for hearing. The same questions of law raised by the defendant in the Lesser case are presented here, and, therefore, the

[illegible]

[illegible]

vs.

[illegible]

Plaintiff in error.

[illegible]

[illegible] the underlined, this court, plaintiff in error here, has found guilty in the municipal Court of Chicago of violation of section 1012 of the Chicago Code of 1911. Judgment was entered on the finding. The complaint charged that the defendant on December 13, 1922, at the City of Chicago, was found in a gambling house, to wit: a reasonable excuse for being so found, in violation of section 1012 of the Chicago Code of 1911. The complaint is a printed form, and following the words "gambling house," a line was drawn through certain words including the following, "and was searched." It is apparent that these words were stricken out by inadvertence. In such a referral on the following grounds:

1. Because the plaintiff failed to introduce in evidence the section of the ordinance of which violation was alleged in complaint, and failed to make any proof that the alleged ordinance was in force at the time the not complained of was committed.

2. That the finding of the court is unreasonable against the weight of the evidence.

This case and the case of City of Chicago v. Jennie Lazare, [illegible], were taken together in the lower court, and by order of this court the two writs of error were consolidated for hearing. The same questions of law raised by the defendant in the Lazare case are presented here, and, therefore, the

conclusions arrived at in that case will govern in the instant case. The court is of the opinion that the finding of the trial court, in this case, is not contrary to the manifest weight of the evidence, and that no error is apparent from the record presented here. The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

[illegible] arrived at in that case will depend on the facts [illegible] case. The court is of the opinion that the [illegible] of the [illegible] rule, is not intended to [illegible] rights of the [illegible], and that the [illegible] these the [illegible] statement [illegible]. The judgment of the [illegible] court is affirmed.

[illegible]: [illegible].

302 - 20631

J. F. O'BRIEN, doing business as J. F. O'BRIEN & CO.,
Plaintiff in Error,

vs.

H. L. NEWHOUSE,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

196 I.A. 39

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This is an action brought by plaintiff against defendant to recover certain commissions which he claims to have earned as a real estate broker in procuring certain leases for defendant and collecting certain rents, and that after deducting the rents collected, from the commissions earned, there is due him the sum of one hundred twenty dollars, for which he seeks recovery. The defendant, in addition to an affidavit of merits, filed a set-off. The court below found the issues against the plaintiff, and in favor of defendant on his set-off, and assessed the defendant's damages on said set-off at the sum of eight dollars.

There are three leases involved, known respectively as the Pappas, Daube and Berger leases. The controverted questions arise in regard to the Daube and Berger leases.

The plaintiff testified that he was authorized by defendant to renew the lease of Daube, who was one of defendant's tenants, at a rental of one hundred twenty five dollars per month; that plaintiff called on Daube and after some negotiations the latter offered one hundred fifteen dollars per month, which offer plaintiff submitted to defendant, and, in pursuance to the latter's request,

This is an action brought by plaintiff against defendant to recover certain commissions which he claims to have earned as a real estate broker in procuring certain leases for defendant and collecting certain rents, and that after deducting the rents collected, from the commissions earned, there is due him the sum of one hundred twenty dollars, for which he seeks recovery. The defendant, in addition to an affidavit of merits, filed a set-off. The court below found the issues against the plaintiff, and in favor of defendant on his set-off, and assessed the plaintiff's damages on said set-off at the sum of eight dollars.

There are three issues involved, known respectively as the Dunne, Seate and Singer leases. The controverted questions arise in regard to the Dunne and Singer leases.

The plaintiff testified that he was authorized by defendant to rent the lease of Dunne, who was one of defendant's tenants, at a rental of one hundred twenty five dollars per month; that plaintiff called on Dunne and after some negotiations the latter offered one hundred fifteen dollars per month, which offer plaintiff submitted to defendant, and, in pursuance to the latter's request,

plaintiff, thereupon, prepared such lease and same was signed by Daube. For this service plaintiff claims to be entitled to a commission amounting to sixty nine dollars. The defendant testified that he negotiated the Daube lease himself, and, at his request, plaintiff only prepared the lease and was entitled to a fee of ten dollars therefor. In regard to this transaction there is no evidence except the testimony of both plaintiff and defendant.

The principal question, therefore, is the claim of plaintiff that he procured Berger as a tenant. In this regard, plaintiff testified that he called upon Berger and asked him to rent defendant's store; that he did not come to any agreement with Berger and finally told him to deal direct with defendant, giving him defendant's address and telephone number. Plaintiff telephoned defendant that he had sent Berger to him, informing defendant of the conversation he had with Berger. The latter testified that he went to see defendant, offered him one hundred thirty-five dollars per month for the store, which offer defendant refused, and that he then considered the matter closed and paid no more attention to it. Berger further testified that he did not hear from anyone regarding the property for several weeks until another real estate broker, named Ash, called to see him regarding renting the same property; that he did not tell Ash that he had talked with plaintiff or defendant in regard thereto, that a few days later he saw defendant and agreed upon the terms of the lease, which he afterwards signed. Defendant testified that in the early part of April, 1913, plaintiff telephoned him that he had interested Berger as a prospective tenant; that plaintiff and Berger had not come to any agreement and that he had referred Berger to defendant; that Berger called upon defendant and discussed with him the leasing

plaintiff, thereupon, prepared such lease and same was signed by Dunbo. For this service plaintiff claims to be entitled to a commission amounting to sixty dollars. The defendant testified that he negotiated the rental himself, and, at his request, plaintiff only prepared the lease and was entitled to a fee of ten dollars therefor. In regard to this transaction there is no evidence except the testimony of both plaintiff and defendant.

The principal question, therefore, is the claim of plaintiff that he procured Berger as a tenant. In this regard, plaintiff testified that he called upon Berger and asked him to rent defendant's store; that he did not come to any agreement with Berger and finally told him to deal direct with defendant, giving him defendant's address and telephone number. Plaintiff testified defendant said he had sent Berger to him, informing defendant of the conversation he had with Berger. The letter testified that he went to see defendant, offered him the hundred sixty-five dollars per month for the store, which offer defendant refused, and that he then consulted the matter closed and paid no more attention to it. Berger further testified that he did not hear from anyone regarding the property for several weeks until another real estate broker, named Ash, called to see him regarding renting the same property; that he did not tell Ash that he had talked with plaintiff or defendant in regard thereto, that a few days later he saw defendant and agreed upon the terms of the lease, which he afterwards signed. Defendant testified that in the middle part of April, 1931, plaintiff telephoned him that he had interested Berger as a prospective tenant; that plaintiff had never had any dealings with defendant and that he had referred Berger to defendant; that Berger called upon defendant and discussed with him the leasing

of the premises, but did not come to any agreement. He further testified that he did not hear from Berger again until some time in August, 1913, when he was called to Chicago from Menocqua, Wisconsin, by the said Ash, who informed defendant that he had a tenant for the store. Defendant testified that he came to Chicago at once and closed a deal whereby Berger leased the store upon entirely different terms than those discussed by Berger, plaintiff and himself.

The court below expressly found that the plaintiff did not procure Berger as a tenant of defendant and did not induce him to lease said store, and that he was not entitled to recover any commission or other compensation therefor,

Whether a broker seeking to recover a commission for services rendered in effecting a sale of property was the procuring cause, the effective means of bringing about such sale, is a question of fact to be determined under the evidence submitted. Reed v. Young, 146 Ill. App. 410, 413.

The fact that a lease of the property in question was finally brought about by the efforts of Ash, with a person with whom defendant had previously negotiated without success, does not furnish a legal basis for a claim for commission by plaintiff, especially when it appears that plaintiff had for about four months ceased negotiations with the lessee and abandoned all efforts to induce him to take the leasehold. Davis v. Gazette, 30 Ill. App. 41, 45. As said in Watts v. Howard & Calkins, 51 Ill. App. 243, 245, "It clearly appears that the effort made by the appellees to effect the sale of the property of appellant entirely failed. Appellees did call the attention of Mr. Johnson to the property, but he declined to purchase, and there is nothing tending to show that appellees had not ceased all effort to sell to him long before his attention was again

of the problem, but did not come to any agreement. He further intimated that he did not feel [illegible] would ever live in Jamaica, 1916, when he was called to [illegible] (Sir Bancroft), licensee, by the main man, who [illegible] defendant [illegible] to [illegible] the City state. Defendant contended that he came to Jamaica at once and stated a [illegible] Barger looked the place upon entirely different terms. Mr. [illegible] discovered by Judge, plaintiff and himself.

The story then expressly [illegible] the plaintiff did not produce Barger as a result of defendant and did not induce him to leave said state, and that he was not entitled to receive any commission or other compensation therefor.

Without a word [illegible] to recover a commission for services rendered in effecting a sale of property was the procuring cause, the effective means of bringing about such sale, is a question of fact to be determined under the relative authority. Dent v. Jones, 3 Ga. App. 427, 431.

The fact that a lease of the property in question was finally brought about by the efforts of [illegible], with a person with whom defendant had previously negotiated without success, does not furnish a legal basis for a claim for commission by plaintiff, especially when it appears that plaintiff had for about four months ceased negotiations with the lessee and abandoned all efforts to induce him to take the lease. Jones v. Spencer, 2 Ga. App. 43, 47. As said in Dalis v. Pence & Calder, 41 Ga. App. 340, 341, "It clearly appears that the effort made by the [illegible] to effect the sale of the property of defendant entirely failed. Appellees did call the attention of Mr. Johnson to the property, but he declined to purchase, and there is nothing tending to show that appellees had not ceased all effort to sell to him long before his attention was again

called to the property by reading an advertisement inserted by appellant. * * * There is nothing to show that Mr. Johnson would ever have again considered the purchase of this property but for the advertisement published by appellant, two months after Johnson had declined to buy."

It will be noted that the lease finally entered into by Berger was executed four months after his conversation with the plaintiff relative thereto. There is no evidence that plaintiff induced Berger to change his mind. Plaintiff did not bring about the agreement for a lease, and, therefore, is not entitled to a com ission. Friend v. Triggs Company, 147 Ill. App. 427.

In view of all the evidence in this case, this court is of the opinion that the plaintiff was not the efficient procuring cause of leasing of defendant's property to either Daube or Berger, and that the findings of the court below are not against the manifest weight of the evidence, and that the court properly entered judgment upon defendant's set-off, in the sum of eight dollars.

It is further contended by the plaintiff that the finding and judgment entered by the court below are erroneous for the reason that both finding and judgment ignore the issues joined on the plaintiff's claim. The court heard the issues raised on the plaintiff's statement of claim and the defendant's set-off and after overruling plaintiff's motion for a finding in his favor, found the plaintiff was indebted to defendant, and, accordingly, gave judgment for the defendant. All of the issues of this case were brought to the attention of the court and were decided in the rendition of the judgment below. Section 47 of the Practice Act, is in part as follows:

sellad to the property by reading an advertisement inserted by appellant. * * * There is evidence to show that Mr. Johnson would over have again considered the purchase of this property but for the advertisement published by appellant, ten months after (because the residence was sold).*

It will be noted that the trial Judge relied in his decision and associated this case with the conversation with the plaintiff relative thereto. There is no evidence that plaintiff induced Berger to change his mind. Plaintiff did not bring about the agreement for a lease, and, therefore, is not entitled to a commission. Erickson v. Tribune Company, 147 Ill. App. 427.

In view of all the evidence in this case, this court is of the opinion that the plaintiff was not the efficient procuring cause of leasing of defendant's property to either Gauge or Berger, and that the findings of the court below are not against the manifest weight of the evidence, and that the court properly entered judgment upon defendant's set-off, in the sum of eight dollars.

It is further contended by the plaintiff that the finding and judgment entered by the court below are erroneous for the reason that both finding and judgment ignore the issues joined on the plaintiff's claim. The court based the issues raised on the plaintiff's statement of claim and the defendant's set-off and after overruling plaintiff's motion for a finding in his favor, found the plaintiff was indebted to defendant, and, accordingly, gave judgment for the defendant. All of the issues of the case were brought to the attention of the court and were included in the resolution of the judgment below. Section 67 of the Practice Act, is in part as follows:

"If it shall appear that the plaintiff is indebted to the defendant, the jury shall find a verdict for the defendant and certify to the court the amount so found; and the court shall give judgment in favor of such defendant, with the costs of his defense. If the cause is tried by the court the finding and judgment shall be in like manner."

This court is of the opinion that plaintiff has had a fair trial and that no prejudicial error has been committed, and the judgment therefore is affirmed.

JUDGMENT AFFIRMED.

489 - 20821

FRANK RUMSZAS,
Appellee,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY CO.,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

196 I.A. 41

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

An action for trespass for [illegible] suit was brought [illegible] Chicago, Rock Island & Pacific by Frank Rumszas. He recovered a verdict for one thousand dollars on which judgment was rendered. The defendant appeals.

The alleged assault occurred on April 21, 1911. Defendant introduced in evidence a paper purporting to be a general release under seal, executed by plaintiff for thirty six dollars, on May 2, 1911, and also introduced a draft, of the same date, payable to order of plaintiff for thirty six dollars, which draft on its face recites, "For personal injuries received at Chicago, Illinois, on April 21, 1911." The alleged release recites that plaintiff releases defendant from all liability, for all claims for injuries, etc., plaintiff acknowledging therein full satisfaction. Defendant contends that such release was a complete bar to this suit, and the trial court, therefore, erred in refusing to instruct the jury on motion of defendant to direct a verdict finding the defendant not guilty.

The plaintiff contends that he was induced, by agents of the defendant, by trick or fraud, to sign said release under the belief that it was a receipt for money

489 - 20821

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The plaintiff contends that he was induced, by agents of the defendant, by trick or fraud, to sign said release under the belief that it was a receipt for money

in payment of wages due him at the time of the happening of the injuries complained of. The plaintiff at the time of the said assault was in the employ of the defendant as a car cleaner, receiving for such services about fifty five dollars per month and there was then due him wages for twenty-one days, which had not been paid.

The burden was on the plaintiff to prove fraud in procuring the execution of the release in question. A release can not be avoided at law except for fraud in its execution. Papke v. G. H. Hammond Co., 192 Ill. 631; Hartley v. C. & A. R. R. Co., 214 Ill. 78; Hemmick v. B. & O. S. W. R. R. Co., 263 Ill. 241; C. & A. R. R. Co. v. Jennings, 114 Ill. App. 622. The plaintiff testified that he could not read English; that the paper constituting the purported release was presented to him by two agents of the company at the hospital, but was not read to him before he signed it; that "Mr. Shaw (one of the defendant's agents) took a pencil and say 'Sign your name on the paper,' and I signed that, and he has a check for me and he gave me that check, and the two men put the paper in their pocket. He said that is a good thing, you get wages in pay for it, don't lose that. * * * The paper (the check) they gave me I kept it one day, and then * * * I gave it to my wife. * * * I do not know what a release is. * * * At the time I signed the release I thought it was for wages I had coming. * * * At the time I was injured I had twenty one days coming, and I thought that the check that Emmick gave me was for that money. After while I got the money I had coming for the twenty one days * * * ." The plaintiff, in part, testified through an interpreter.

Frank B. Emmick, agent of defendant, testified that he and Shaw called on plaintiff on May 2, 1911, for

in payment of wages due him at the time of the injury of the injuries complained of. The plaintiff at the time of the said accident was in the employ of the defendants as a car cleaner, receiving for such services about fifty five dollars per month and there was then due him wages for twenty-one days, which had not been paid.

The burden and on the plaintiff to prove fraud in procuring the execution of the release in question. A release can not be avoided at law except for fraud in the execution. Page v. G. H. Hammond Co., 108 Ill. 651; Murray v. G. & A. R. R. Co., 101 Ill. 72; Kendall v. T. & P. R. R. Co., 383 Ill. 271; G. & A. R. R. Co. v. Jenkins, 114 Ill. App. 622. The plaintiff testified that he could not read English; that the paper constituting the reported release was presented to him by two agents of the company at the hospital, but was not read to him before he signed it; that Mr. Shaw (one of the defendant's agents) said a pencil and say 'Sign your name on the paper,' and I signed that, and he has a check for me and he gave me that check, and the two men put the paper in their pocket. It said that is a good thing, you got wages to pay for it, can't lose that. * * * The paper (the check) they gave me I kept it one day, and then * * * I gave it to my wife. * * * I do not know what a release is. * * * At the time I signed the release I thought it was for wages I had coming. * * * At the time I was injured I had twenty one days coming, and I thought that the check that Smith gave me was for that money. After while I got the money I had coming for the twenty one days * * *." The plaintiff, in part, testified through an interpreter.

Ivan E. Smith, agent of defendant, testified that he and Shaw called on plaintiff on May 7, 1921, for

the purpose of effecting with plaintiff a settlement of his claim against defendant. Emmick testified that he was informed by plaintiff that two dollars per day would be a fair average of what plaintiff made; that plaintiff had already lost eleven days and expected to return to work in a week. Emmick further testified that he then explained to plaintiff that eighteen days at two dollars per day would be thirty six dollars and that he, Emmick, then prepared the said release, read it to plaintiff, telling him that the release meant that plaintiff was to receive thirty six dollars for his injuries and asked him if he wanted to settle for such amount. Emmick further testified that nothing was said to plaintiff to the effect that the release was a receipt for money which was owing to plaintiff from the railway company or that they were paying him for work done (immediately prior to April 21, 1911) by plaintiff. Although plaintiff testified that he understood that the paper which he signed was a receipt for wages due him at the time he received the injuries complained of, he did not testify that either of defendant's agents told him that the release he signed was for such wages, or that the draft which he received was in payment thereof. Within a few days following the execution by plaintiff of said release and before he cashed said draft, he admitted that he was informed by Dr. Schultze, of the hospital, that he had signed a release "for his injuries." He subsequently was paid by defendant the amount due him as wages for said twenty one days. The check or draft given him May 2, 1911, when he signed such release, charged plaintiff with notice that it was given to and accepted by him in settlement of his claim. The draft is on a printed form with the following words legibly written on its face, "For personal injuries

The purpose of effecting with plaintiff a settlement of his claim against defendant. Hamlick testified that he was informed by plaintiff that two dollars per day would be a fair average of what plaintiff made; that plaintiff had already lost eleven days and expected to return to work in a week. Hamlick further testified that he then explained to plaintiff that eighteen days at two dollars per day would be thirty six dollars and that he, Hamlick, then produced the release, read it to plaintiff, telling him that the release meant that plaintiff was to receive thirty six dollars for his injuries and asked him if he wanted to settle for such amount. Hamlick further testified that plaintiff was said to plaintiff to the effect that the release was a receipt for money which was owing to plaintiff from the railway company or that they were paying him for work done. Immediately prior to signing, testified by plaintiff. Although plaintiff testified that he understood that the paper which he signed was a receipt for money due him at the time he received the injuries complained of, he did not testify that either of defendant's agents told him that the release he signed was for such wages, or that the draft which he received was in payment thereof. Within a few days following the execution by plaintiff of said release and before he cashed said draft, he admitted that he was informed by Dr. Hamilton, of the hospital, that he had signed a release "for his injuries." Subsequently was said by defendant the amount due him as wages for said twenty one days. The draft was drawn on May 2, 1911, upon the Chase National Bank, payable to the order of plaintiff with which it was given to and accepted by him in settlement of his claim. The draft is on a printed form with the following words legibly written on its face, "For personal injuries

received at Chicago, April 21, 1911", and was not cashed until May 10, 1911. The proceeds of such draft were retained by him, and no offer was ever made by plaintiff to return, to the defendant, the money thus received.

It is the well settled law of this state that the fraud that would obviate the necessity of the return of money, or offer to do so, paid in settlement and for a release, is the fraud of a party procuring the release and must be an actual, intended fraud. Pawnee Coal Company v. Royce, 184 Ill. 402, 411. It is manifest from all the evidence that the plaintiff by acceptance and cashing of said draft, ratified the settlement.

The manifest and clear preponderance of the evidence shows that there was no fraud in procuring the execution of the release and that it is a valid defense to this action. Miller v. St. L. S. & Peoria R. Co., 176 Ill. App. 439, 444.

It is unnecessary to review the other assignments of error. The judgment is reversed with a finding of fact.

REVERSED.

FINDING OF FACT: There was no fraud in procuring the execution of the release offered in evidence; that Frank Rumszas, appellee, also ratified the release by cashing the draft, with notice that it was given for a release, and retaining the proceeds.

Pendrick at Chicago, April 24, 1911", and was now argued until May 22, 1911. The proceeds of such court were expended in him, but on after one was not made by plaintiff in error, on the defendant, the court found [illegible]

It is the well settled law of this state that the fraud or a trial affirm the necessity of the return of money, or offer to do so, paid in settlement and for a release, in the fraud of a party procuring the release and must be an action, intended fraud. Jones Trial Jones v. Burns, 184 Ill. 400, 422. It is manifest from all the evidence that the plaintiff by misrepresentation and making of said fraud, procured the settlement.

The modified and clear definitions of the evidence show that there was no fraud in procuring the execution of the release and that it is a valid defense to this action. Illing v. Ch. & L. R R Co., 224 Ill. 492, 401.

It is unnecessary to review the other contentions of error. The judgment is reversed with a finding of fact.

REVERSED.

MEMORANDUM OF FACT: There was no fraud in procuring the execution of the release claimed in evidence; that Fred Simmons, minister, the plaintiff's the release of money, the trial, with notice that it was given for a release, and remaining the proceeds.

567 - 20902

PAGE V. LYON, Trustee, etc., Appellant,	APPEAL FROM
vs.	SUPERIOR COURT,
	COOK COUNTY.
PONY MOORE et al., (Defds) FRANK MARSHALL, Appellees.	196 I.A. 45

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This case comes before this court for review upon an appeal from a decree entered by the Superior Court of Cook County. The principal facts in this case up to June 18, 1913 are to be found in Lyon v. Moore, 259 Ill. 23, and so far as material to a decision in this case are as follows: Pony Moore was adjudged a bankrupt on August 12, 1907, on his petition, and Page V. Lyon, appellant, was appointed trustee. Moore was the lessee of certain premises from Mrs. Fowler, and he sub-let them for the entire remainder of the term from November 1, 1905, to Joseph Marshall, who afterward assigned the sub-lease to Frank J. Marshall. Moore retained no reversion in himself, but while he was liable to Mrs. Fowler for only one hundred dollars a month the rent reserved to him in the sub-lease was one hundred fifty dollars a month, so that the lease was worth to him fifty dollars a month for the remainder of the term. After a judgment for eighteen thousand dollars had been rendered against Moore, he and a certain Blunk devised a fraudulent scheme to defraud the creditor by putting that fifty dollars a month beyond his reach, and to carry the scheme into effect Moore surrendered the original lease. Marshall, as assignee of Moore's lease, was liable

Lyon v. Lyon, Trustee, etc.,
Appellant,

vs.

Moore et al.,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

1901 I.A. 45

Mr. Justice Magruder delivered the opinion of the court.

This suit comes before this court for trial de novo on appeal from a decree entered by the superior court of Cook County. The principal facts in this case up to June 12, 1912 are to be found in Lyon v. Moore, 255 Ill. 58, and so far as material in a decision in this case we reiterate what was stated in that opinion.

Hilarion Moore was an engineer & machinist on June 12, 1897, on his position, and Hugo V. Lyon, appellant, was appointed trustee. Moore was the lessee of certain premises 3171 Ivanhoe, and he sub-let them for the unexpired remainder of the term from November 1, 1909, to Joseph Marshall, who afterward assigned the sub-lease to Frank T. Marshall. Moore retained no reversion in himself, but while he was liable to Lyon, lessor for only one hundred dollars a month, he rent reserved to him in the sub-lease was one hundred fifty dollars a month. In fact the lease was worth to him fifty dollars a month for the remainder of the term. After a judgment for eighteen thousand dollars had been rendered against Moore, he and a certain Frank Marshall a fraudulent scheme to defraud the creditor by putting that fifty dollars a month beyond his reach, and to carry the scheme into effect Moore surrendered the original lease. Marshall, as partner of Moore's lessee, was liable

to Mrs. Fowler for one hundred dollars a month as rent, and Moore had a contract right to the additional fifty dollars a month rent which Marshall was to pay. The Supreme Court held that the record showed a liability to said appellant from the lessee under the sub-lease in question, from the time the bill was filed and process served on such lessee, but that the record did not contain facts from which such liability could be determined and reversed the judgment of the Appellate Court and the decree of the Superior Court, and remanded the cause to the Superior Court, with directions to enter a decree requiring every person liable, as lessee, for the rent of the premises during the existence of the lease after service of process on Joseph Marshall and Frank Marshall to account for and pay to appellant, as trustee in bankruptcy for Pony Moore, fifty dollars per month reserved to Moore by the agreement.

In pursuance to said remanding order and opinion of the Supreme Court, the case was redocketed in the Superior Court. Amended and supplemental answer was filed by Joseph and Frank Marshall, appellees, issues joined, evidence heard and decree entered by that court finding that Joseph Marshall was not indebted to the complainant, and that the defendant Frank Marshall was liable and should pay to the complainant the sum of sixty five dollars, dismissing the bill as to the defendant, Joseph Marshall, for want of equity. The decree further found that appellant, in open court, renounced all claims and demands against any of the defendants to the bill of complaint herein, other than Joseph Marshall and Frank Marshall.

Appellant contends that the court committed prejudicial error in admitting improper evidence on the part of defendants and rejecting proper evidence offered by appellant, and in rendering a decree against Frank Marshall

in kind. Payer for one hundred dollars a month in rent, and moore had a contract right to the additional fifty dollars a month rent which Marshall was to pay. The Supreme Court held that the record showed a liability to said appellant from the lessee under the sub-lease in question, from the time the bill was filed and process served on such lessee, but that the record did not contain facts from which such liability could be determined and reversed the judgment of the Appellate Court and the decree of the Superior Court, and remanded the cause to the Superior Court, with directions to enter a decree requiring every person liable, as lessee, for the rent of the premises during the existence of the lease after service of process on Joseph Marshall and Frank Marshall to account for and pay to appellant, as trustee in bankruptcy for Percy Moore, fifty dollars per month reserved in lease by the agreement.

In pursuance to said remanding order and opinion of the Supreme Court, the case was considered in the Superior Court. Another and satisfactory answer was filed by Joseph and Frank Marshall, appellees, issues joined, evidence heard and decree entered by that court finding that Joseph Marshall was not indebted to the complainant, and that the defendant Frank Marshall was liable and should pay to the complainant the sum of sixty five dollars. Disclaimer was filed as to the defendant, Joseph Marshall, for want of equity. The Superior Further found that appellant, in open court, received all claims and demands against any of the defendants in the bill of complaint herein, other than Joseph Marshall and Frank Marshall.

Appellant contends that the court committed prejudicial error in admitting improper evidence on the part of defendants and rejecting proper evidence offered by appellant, and in remanding a decree against Frank Marshall

only, and in not rendering a decree in favor of appellant for fifty dollars per month, from February 26, 1908, to the expiration of the term of the lease (April 30, 1915), against both Frank and Joseph Marshall.

The leasehold in question was also involved in the case of Taylor v. Marshall, 255 Ill. 545, and in Lyon v. Moore, 168 Ill. App. 462.

In regard to the first assignment of error appellant's counsel contends that any evidence that existed at the time of the former hearing, or that the parties could have produced at that time, should not have been admitted by the Superior Court in the subsequent hearing. Appellant contends that the Superior Court, under the opinion of the Supreme Court, should not have heard testimony and that its only power was to enter a decree against these defendants. In the case of Aurora & Geneva Railway Company v. Harvey, 178 Ill. 477, 484, the court, speaking of a similar question, said:

> " * * * It is well understood that when a cause is reversed and remanded with direction to proceed in conformity to the opinion then filed, and it appears from the opinion that the grounds of reversal are of a character to be obviated by subsequent amendment of the pleadings or the introduction of additional evidence, it is the duty of the trial court to permit the cause to be redocketed and then to permit amendments to be made and evidence to be introduced on the hearing, just as though it was then being heard for the first time. (Washburn & Moen Mfg. Co. v. Wire Fence Co., 119 Ill. 130; West v. Douglas, 110 Ill. 164.) * * * It is only when the merits of the controversy and the ultimate rights of the parties are decided in a court of review that a reversal and remandment will deprive the court below of the right to allow amendments to the pleadings and hear other evidence, and the authorities cited by counsel for appellees go no farther than this."

It is manifest that the Supreme Court having found that the record then before it did not contain facts from which the court could determine liability, such liability would be determined by the Superior Court upon such further evidence as the parties might present to that court. Counsel

only, and in such instances a decree in favor of appellant for fifty dollars per month, then remaining on, 1919, in the appropriation of the sum of the issue (April 30, 1919), appellant both from and Jacob Bundell.

The Instructions in question are, this involved in the case of Taylor v. Bundell, 180 Ill. 518, and in Ryan v. Ryan, 180 Ill. 198, 198.

In regard to the first assignment of error appellant's counsel contends that any evidence that existed at the time of the Jacob Bundell, or that the parties could have presented at that time, should not have been admitted by the Superior Court in the Polyglotte Bundell. Appellant contends that the Superior Court, under the evidence of the Supreme Court, should not have been terminated and that the only power was to enter a decree against Jacob Bundell. In the case of Jerome E Ryan against Lorenzo v. Ryan, 178 Ill. 477, 480, the court, speaking of a similar question, said:

> "* * * It is well understood that when a cause is terminated and remanded with directions to proceed in accordance to the opinion then filed, and it appears from the opinion that the process of reversal was a conclusion of the parties by mutual consent of the pleadings or the introduction of additional evidence, it is the duty of the trial court to grant the same to be referred and then be proper amendments to be made and evidence to be introduced on the hearing, just as though it was then being heard for the first time. (Bundell v. Ryan, 178 Ill. 198; Ryan v. Ryan, 180 Ill. 198.) * * * It is only when the merits of the controversy and the ultimate rights of the parties are decided in a court of review that a final and conclusive will rights the court take of the right to allow amendments to the pleadings and their evidence, and the authorities cited by counsel for appellant do not further this case."

It is manifest that the Superior Court having found that the record then before it did not contain facts from which the court could determine finally, and finally would be determined by the Superior Court upon such further evidence as the parties might present to that court. Counsel

for appellee in the hearing before the Superior Court announced that the certificate of evidence, then on file, contained all of the evidence of appellee and then rested his case.

Joseph Marshall testified that he assigned the lease in question to Frank Marshall on November 9, 1906, and that he has not occupied or been interested in said premises since that time. The following document was introduced in evidence:

> "November 9, 1906. Mr. J. H. Marshall: The assignment of the lease to Frank J. Marshall is agreeable to me. I will no longer look to you for rent. You are discharged and released from further obligations to pay me rent on your lease for 171 - 3 -5 21st St., Chicago. Pony Moore."

Frank J. Marshall testified that he thereupon entered into possession of the premises in question, paid rent therefor from November 1, 1906, to March 1, 1908, and ceased to occupy said premises March 18, 1908. There was also offered in evidence a transcript of the judgment of the Municipal Court entered April 15, 1910, in the case of Elnoria H. Fowler v. Pony Moore, et al., that defendants, Pony Moore and Frank Marshall, are guilty of unlawfully withholding from plaintiff possession of the premises 171-3-5 21st Street and for possession thereof.

Walter H. Mc Donald, agent for Mrs. Fowler, owner of the premises in question, testified that from November 1, 1906, to the time of the entering of the said judgment in the Municipal Court rent was received from Moore and Marshall; that when Moore and Marshall defaulted in payment of their rent "we put them out and we then made a new deal direct from the landlord to Leight; Marshall had paid one hundred fifty dollars per month. We sent one hundred dollars per month to Mrs. Fowler and fifty dollars per month for (to) Moore." Moore was the original lessee who sub-let the premises in question to Joseph Marshall for the full term of the lease.

For preliminary to the hearing before the Surrogate Court, counsel for the contestants of evidence, have on file, containing all of the evidence of witnesses who them tested this case.

Joseph Marshall testified that he resided by lease on premises to Frank Marshall on June 9, 1906, and that he has not occupied or been interested in said premises since that time. The following document was introduced in evidence:

"September 9, 1906. Mr. J. N. Marshall: The assignment of the lease to Frank J. Marshall in Amsterdam is yes. I will be income back to you for rent. The six dollarsgas and insurance further satisfactory to you by rent on your lease for 1906 - 9 - 1907 1). Thanks. Yours truly."

Frank J. Marshall testified that he subsequently entered into possession of the premises in question, paid rent therefor from November 1, 1906, to March 1, 1908, and became in arrears said premises March 15, 1908. There was also offered in evidence a transcript of the judgment of the Municipal Court entered April 15, 1910, in the case of Charles R. Field v. John Moore, et al., in which defendants, Tony Moore and Frank Marshall, are jointly and severally with-holding from plaintiff possession of the premises 171-173 East street, and (2) possessing thereof.

Walter R. McCaull, sworn for Mrs. Field, testified that the premises in question, constituting that from November 1, 1906, to the time of the entering of the said judgment in the Municipal Court rent was received from Moore and Marshall; that Mrs. Field, pursuant to request of Mr. McCaull rent "we put them out and we been more a few dollars from the landlord to Ralph; Marshall had paid one hundred fifty dollars per month. He just was behind fifty per month to Mrs. Fisher and fifty dollars per month for [illegible]. Since the relinquished lease who sub-let the premises in question to Joseph Marshall for the full term of the lease.

All of the foregoing evidence was objected to by counsel for appellant because it was urged such evidence related to matters res adjudicata, and to facts and matters existing at the time of the former hearing, and that it not having been introduced defendants were thereafter barred from introducing same.

This court is of the opinion that such evidence was properly admitted. Hunter v. Hatch, 45 Ill. 178; Chickering v. Failes et al., 29 Ill. 294, 302; Rush v. Rush, 65 Ill. App. 548; Waters v. Waters, 225 Ill. 559, 562; Prentice v. Crane, 240 Ill. 250, 252. It certainly was competent to show that the lease as to Joseph and Frank Marshall was terminated in 1910 and that the owner was given possession thereof and thereafter rented the premises to a new tenant, Leight, who took possession under such tenancy. The decree entered by the Superior Court, under the evidence, properly found that Frank Marshall was liable for rent for one month, March, 1908, at which time he assigned his lease to Myrtle Ryan.

The appellant offered in evidence the bill of complaint in Taylor v. Marshall, supra, and the cross bill of Elnoria H. Fowler and the decree therein. Objection was made, that such pleadings were not admissible against appellant as he was not a party in that proceeding. The objection was overruled and the pleadings admitted in evidence. The decree was properly received as one element in the chain of evidence in the matter of account, tending to prove the ultimate fact of the termination of the lease in question and the sub-letting thereafter by the owner to others.

Appellant, in his second assignment of error, complains of the ruling of the court in refusing to permit Julius F. Taylor to testify that he had tendered or offered

All of the foregoing evidence was objected to by counsel for appellant because it was urged such evidence related to matters *res adjudicata*, and to facts and matters existing at the time of the former hearing, and that it was having been introduced defendants were therefore barred from introducing same.

This court is of the opinion that such evidence was properly admitted. *Cooper v. Cooper*, 16 Ill. 374; *Blackwell v. Jackson* 12 Ill., 34 Ill. 274; *Ward v. Cook*, 41 Ill., 492; *Cooper v. Cooper*, 32 Ill. 448, and *Crawford v. Spear*, 221 Ill. 326, 328. It certainly was competent to show what the issue in Joseph and Frank Marshall was determined in 1910; and that the owner was given possession thereof and thereafter rented the premises to a new tenant, Leigh, who took possession under such tenancy. The decree entered by the Superior Court, under the evidence, properly found that Frank Marshall was liable for rent for one month, March, 1908, at which time he resumed his lease to Sylvia Lyon.

The appellant attempts in evidence the bill of complaint in *Taylor v. Marshall, supra*, and the cross bill of Charles H. Moulor and the decree thereon. Objection was made, that such pleadings were not admissible against appellant as he was not a party in that proceeding. The objection was overruled and the pleadings admitted in evidence. The decree was properly received as one element in the chain of evidence in the matter of account, tending to prove the ultimate fact of the termination of the lease in question and the subsisting tenancy by the owner to appellee.

Appellant, in his second assignment of error, complains of the ruling of the court in refusing to permit Julia F. Taylor to testify that he had received an offer

to pay rent to the owner (Mrs. Fowler) at a time subsequent to the termination of liability, of both Joseph and Frank Marshall, under the lease. Such evidence was wholly immaterial and was properly excluded. It is not contended by appellant that the decree is against the manifest weight of the evidence. As appellant's counsel, in the last hearing before the Superior Court, renounced all claims and demands against any of the defendants other than Joseph and Frank Marshall, the court was warranted under the evidence in rendering a decree against Frank Marshall only. The decree of the Superior Court will be affirmed.

DECREE AFFIRMED.

to pay rent to the owner (Duke, Prince) in a time antecedent to the knowledge of liability, of both Tenant and Tenant Servant, under the lease. Such reliance was wholly inconsistent and was grossly negligent. It is not sufficient for appellant that the course is against the manifest weight of the evidence. In appellant's counsel, in the last hearing before the Superior Court, mentioned all claims and towards appellant and of the defendants who: Duke Tenant and Tenant Servant, the court was satisfied under the evidence in rendering a verdict against Duke personally only. The issues of the counter-claim must be affirmed.

WHEREFORE, AFFIRMED.

5991 1115

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of ~~October~~ april, in the year of our Lord one thousand nine hundred and ~~fourteen~~ fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

~~J. G. MISCHKE~~, Sheriff.
E. M. Davis

BE IT REMEMBERED, that afterwards, to-wit: on the ~~9th~~ 22d day of ~~March~~ June, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5991.

Mary Frances Lyons,

Plaintiff in error.

vs Error to Livingston.

Joseph P. Lyons, Defendant in error.

Carnes, P. J.

This is a writ of error prosecuted by the complainant in a divorce suit, Mary Frances Lyons the plaintiff in error, to reverse a decree entered in that suit, in effect dismissing her bill. She brings here a record of 116 pages which is certified by the Clerk of the trial court to be a true copy of the record in the case "except certain court orders not filed in said cause," and files an abstract of six pages which she says presents the matters relied on for reversal; that she has shown in the abstract the bill, amended bill, the answers thereto and the decree; and that the only question before this court is "Are the findings in the decree sufficient to sustain it in the absence of a certificate of evidence." She contends that in a divorce proceeding, in the absence of a certificate of evidence, a decree for the defendant must find facts as to the residence of the complainant sufficient to show jurisdiction of the case, and that this is especially so in this case because the decree for the defendant, instead of dismissing the bill with no findings, did recite some finding of facts.

It appears that the plaintiff in erroffiled a bill for separate maintenance November 19, 1913, in which she alleged among other things;

"That she is and has been for many years last past been a resident of the said County of Livingston, State of Illinois; and charged as grounds for relief extreme and repeated cruelty, setting out in detail in support of the charge acts of the hus-

No. 80. 1903.

Mary Thomas Lyons,

Plaintiff in error,

vs.

Error to Lewis.

Joseph P. Lyons, Defendant in error.

Harris, J. C.

This is a writ of error prosecuted by the complainant in a divorce suit, Mary Thomas Lyons the plaintiff in error, to reverse a decree entered in that suit, in favor of defendant in the bill. The bringing here a record of 116 pages which is certified by the Clerk of the trial court to be a true copy of the record in the case "except certain court orders not filed in said cause," and files an abstract of six pages which she says represents the matters relied on for reversal; that she has shown in the abstract the bill, amended bill, the answers thereto and the decree; and that the only question before this court is "Are the findings in the decree sufficient to a match in the absence of a certificate of evidence." The contends that in a divorce proceeding, in the absence of a certificate of evidence, a decree for the defendant must find facts as to the residence of the complainant sufficient to show jurisdiction of the case, and that this is essentially so in this case because the decree for the defendant, instead of dismissing the bill with no findings, did recite some finding of facts.

It appears that the plaintiff in error filed a bill for separate maintenance November 15, 1897, in which she alleged among other things:

"That she is and has been for many years last past been a resident of the said County of Livingston, State of Illinois; and c argued as grounds for relief extreme and repeated cruelty, setting out in detail in support of the charge acts of the hus-

band which if proven would entitle her to a decree of divorce if the prayer of the bill asked that relief. Defendant in error filed an answer January 18, 1913, in which he "admits that the said complainant. Mary Frances Lyons has been a resident of the said County of Livingston, in the State of Illinois for many years last past" and denies all charges of cruelty. It is to be observed here that the bill alleges and the answer admits the r sidence of the complainant in the county where the bill was filed at the time of the filing of the bill and in the State for more than one year prior thereto. The answer is not open to the criticism that has been held good in an answer, filed some days after the bill was filed, admitting that the complainant had been a resident of the State more than one year last past, which might be true, and still she might not have been a resident more than one year before the bill was filed; the term "many years last past" leaves no ground for contention that the necessary residence of complainant is not admitted by the answer. After the answer was filed there was much controversy over questions of temporary alimony and custody of the children and on March 11, 1913, an order was entered by agreement of the parties in reference thereto. Afterwards January 21, 1914, plaintiff in error filed an amended bill praying for a divorce instead of separate maintenance, otherwise not differing materially from her former bill. Defendant in error answered, February 29, 1914, with the same admissions and denials as in his former answer. Then, without any record of a trial except what is found in the decree, there follows a decree entered March 4, 1914, which recites the appearance of the parties in person and by counsel and a hearing on the amended bill and answer and replication thereto, and evidence, oral and documentary, adduced by the respective parties; and finds that the court

that which if proven would entitle her to a decree of divorce if the prayer of the bill asked that relief. Defendant in error filed an answer January 15, 1913, in which he "admits that the said complainant, Mary Frances Lyons has been a resident of the said County of Livingston, in the State of Illinois for many years last past" and denies all charges of cruelty. It is to be observed here that the bill alleges and the answer admits the residence of the complainant in the county where the bill was filed at the time of the filing of the bill and in the State for more than one year prior thereto. The answer is not open to the criticism that has been held good in an answer, filed some days after the bill was filed, admitting that the complainant had been a resident of the State more than one year last past, which might be true, and still she might not have been a resident more than one year before the bill was filed; the term "said State last past" leaves in ground for contention that the necessary residence of complainant is not admitted by the answer. After the answer was filed there was much controversy over questions of temporary alimony and custody of the children and on March 11, 1913, an order was entered by agreement of the parties in reference thereto. Afterwards January 21, 1914, plaintiff in error filed an amended bill praying for a divorce instead of separate maintenance, statutes not differing materially from her former bill. Defendant in error answered, February 28, 1914, with the same admissions and denials as in his former answer. This, strict and remote of a trial except what is found in the decree, there follows a decree entered March 4, 1914, which recites the appearance of the parties in person and by counsel and a hearing on the amended bill and answer and replication thereto, and evidence, oral and documentary, adduced by the respective parties; and finds that the court

has jurisdiction of the subject matter and the parties and "that the equities of the case are with the defendant", and after finding the facts as to the marriage, date thereof, etc., further finds:

"That the said defendant, Joseph P. Lyons, has not, during their said married life been guilty of extreme and repeated cruelty toward the said complainant, Mary Frances Lyons, as alleged in said amended bill of complaint, and that the leaving of said home by said complainant, Mary Frances Lyons, and living separate and apart therefrom was not through the fault of said defendant."

Closing with an order as follows:

"It is therefore considered, ordered, adjudged and decreed by the court that the complainant's prayer for divorce, in said amended bill of complaint contained, be and the same is hereby denied. It is further ordered by the court that the complainant and defendant pay the costs of this proceeding."

It is settled law in this state that a decree of divorce not supported by a certificate of evidence of findings of facts as to the residence of the complainant required by the statute to give the court jurisdiction of the case will be reversed on appeal or writ of error. Becklenberg v Becklenberg, 232 Ill.120 though such a decree is good on collateral attacks. Jeffries v Alexander, 266 Ill. 49. The question of residence goes to the jurisdiction and may be first raised on appeal. Fisher v City of Chicago, 213 Ill. 268; Garrett v Garrett 252 Ill. 318. A general finding that the Court has jurisdiction of the parties and the subject matter is not sufficient answer to the objection that residence is not found. Becklenberg v Becklenberg, supra. But it may be inferred from the opinion in that case that a proper allegation of residence in the bill admitted in the answer, would be sufficient to estop either party from raising that question on appeal.

the jurisdiction of the subject matter and the parties and "that the equities of the case are with the defendant", and after finding the facts as to the marriage, date thereof, etc., further find:

"That the said defendant, Joseph P. Lyons, has not, during their said married life been guilty of extreme and repeated cruelty toward the said complainant, Mary Frances Lyons, as alleged in said amended bill of complaint, nor that the leaving of said home by said complainant, Mary Frances Lyons, and living separate and apart from the said defendant, was without the fault of said defendant."

Counter with an order as follows:

"It is therefore considered, ordered, adjudged and decreed by the court that the complainant's prayer for divorce, in said amended bill of complaint contained, be and the same is hereby denied. It is further ordered by the court that the complainant and defendant pay the costs of this proceeding."

It is settled law in this state that a decree of divorce not supported by a certificate of evidence or findings of fact as to the residence of the complainant required by the statute to give the court jurisdiction of the case will be reversed on appeal or writ of error. Beckenberg v Beckenberg, 252 Ill.,120 (such a decree is good on collateral attack. Griffiths v Lissender, 286 Ill. 42. The question of residence goes to the jurisdiction and may be first raised on appeal. Fisher v City of Chicago, 213 Ill. 288; Barnett v Barnett 252 Ill. 316. A general finding that the Court has jurisdiction of the parties and of the subject is not sufficient where or the evidence that residence is not found. Beckenberg v Beckenberg, supra. But it may be inferred from the opinion in that case that a proper allegation of residence in the bill entitled in the cause, would be sufficient to stop either party from raising the question on appeal.

There is no doubt that a decree granting relief must be supported, in so far as the allegations in the bill are not admitted in the answer by findings of fact or by a certificate of evidence; but this rule only applies to cases where affirmative relief is sought and obtained. First National Bank v Baker, 161 Ill 281; Kelly v Funkhouser, 171 Ill. 205. A decree dismissing a bill needs no supporting evidence since such a decree may be rendered for want of evidence. Thorne v Jung, 253 Ill. 584.

We take it the decree is equivalent to one dismissing the bill on a hearing for want of equity. If that is the effect of the decree mere informality does not vitiate it. 16 Cyc. 476. While no finding of facts was necessary we see no reason for holding that an unnecessary finding of a part ofthe facts, or reasons, for dismissing the bill, should make it imperative that other facts should be found or reasons given. We suppose even if the court had not jurisdiction; if it had ascertained on the trial that the residence alleged in the bill and admitted in the answer was not true, but that the complainant in fact did not reside in the county when she filed her bill, or had not resided in the State for one year next prior thereto, it would have been the duty of the Court to dismiss the bill and to provide in some way for the payment of the costs to be charged against the parties to the proceeding. Plaintiff in error was liable in the first instance for costs made by her. It does not appear how much or what costs were incurred but it is evident from the size of the record that each party had voluntarily become liable for quite a bill of costs. The Court in Chancery cases and especially in divorce cases has a large discretion in apportioning costs between the parties. There is no ~~xxxxxxxxxx~~ complaint as to the Courts manner of taxing costs on both ~~xxxxxx~~ of the parties The only question raised

There is no doubt that a decree granting relief must be supported, in so far as the allegations in the bill are not admitted in the answer by findings of fact as by a certificate of evidence, but this rule only applies to cases where affirmative relief is sought and obtained. First National Bank v Baker, 121 Ill. 283; Kelly v Tunnicliff, 173 Ill. [illegible]. A decree dismissing a bill needs no supporting evidence since such a decree may be rendered for want of evidence. Thorne v Jung, 285 Ill. 328.

We take it the decree is equivalent to one dismissing the bill on a hearing for want of equity. If that is the effect of the decree mere informality does not vitiate it. Id 329. 476. While no finding of facts was necessary we see no reason for holding that an unnecessary finding of a part of the facts, or reasons, for dismissing the bill, should make it imperative that other facts should be found or reasons given. We suppose even if the court had not jurisdiction; if it had ascertained on the trial that the residence alleged in the bill and admitted in the answer was not true, but that the complainant in fact did not reside in the county when she filed her bill, or had not resided in the State for one year next prior thereto, it would have been the duty of the Court to dismiss the bill and to provide in some way for the payment of the costs to be charged against the parties to the proceeding. Plaintiff in error was liable in the first instance for costs made by her. It does not appear how much of what costs were incurred but it is evident from the size of the record that each party had voluntarily become liable for quite a bill of costs. The Court in Chancery cases and especially in divorce cases has a large discretion in apportioning costs between the parties. There is no ~~maximum~~ complaint as to the Court's manner of taking costs on both sides of the pleadings. The only question raised

ies whether the Court could enter a the decree without a finding of residence of the complainant in error, such a residence and for such a time as the Statute requires to give the court jurisdiction of the case. We are of the opinion that on the record in this case such a finding was not necessary, and that plaintiff in error is estopped by her averment of residence in her bill to say here that she is injured by the failure of the Court to find the fact so by her alleged.

The decree is affirmed.

Affirmed.

law "whether the Court could extend a the decree without a finding of residence of the complainant in error, such a residence not for such a time as the Statute requires to give the court jurisdiction of the case. We are of the opinion that on the record in this case such a finding was not necessary, and that jurisdiction in error is secured by her residence of residence in her will in any case that she is injured by the failure of the Court to find the fact so by the allegat.

The decree is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

R H Dwid Oct 21/15

BE IT REMEMBERED, that afterwards, to-wit: on the ~~6th~~ 15 day of ~~January~~ July, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures fowllowing, to-wit:

6054

1117

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
J. G. MISCHKE, Sheriff.

R H Druid Oct 21/15

BE IT REMEMBERED, that afterwards, to-wit: on the ~~8th~~ 15 day of ~~January~~ July, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures fowllowing, to-wit:

Gen. No. 6054

Grace L. Ferry, Admrx. &c. appellant

vs Appeal from Lake.

City of Waukegan, appellee.

Niehaus, J.

This is an action on the case commenced in the circuit court of Lake County by the appellant, Grace L. Ferry, as Administratrix of the estate of Edward L. Ferry, deceased her husband, against the appellee, city of Waukegan, to recover damages suffered by the death of appellant's intestate, whose death was the result of an automobile accident ~~xxxxx~~ occurring on one of the streets in the city of Waukegan.

The declaration which contained two counts, alleges that the ~~xxxxxx~~ accident was caused by the presence in the street of a pile of sand, gravel, plaster and other debris, which was dangerous to passing travelers in wagons and automobiles. The negligence charged in the first count, is that the city of Waukegan had knowledge of the esistance of this dangerous pile in the street, for a long time prior to the accident, and negligently allowed it to remain there; and in the second count, that the city by the use of reasonable diligence, ought to have known of the existence of this pile; and caused its removal from the street. Both counts allege that the appellant's intestate, was at all times in the exercise of reasonable care for his own safety.

The appellee pleaded the general issue, and a jury trial was had. At the close of the evidence, on motion of the appellee, the Court excluded all the evidence from the jury, and instructed them to find the appellee not guilty. The jury returned a verdict in accordance with the instruction. Thereupon the appellant made a motion for a new trial, which was denied, and the court rendered judgment for the appellee on the verdict. The case is brought to this court on appeal

Gen. No. 4084

Grace L. Ferry, Admrx. Ex. Appellant

vs. Appeal from Lake.

City of Waukegan, Appellee.

Mileham, J.

This is an action on the case commenced in the circuit court of Lake County by the appellant, Grace L. Ferry, as Administratrix of the estate of Edward L. Ferry, deceased her husband, against the appellee, city of Waukegan, to recover damages suffered by the death of appellant's intestate, whose death was the result of an automobile accident occurring on one of the streets in the city of Waukegan.

The declaration which contained two counts, alleges that the accident was caused by the presence in the street of a pile of sand, gravel, plaster and other debris, which was dangerous to passing travelers in wagons and automobiles. The negligence charged in the first count, is that the city of Waukegan had knowledge of the existence of this dangerous pile in the street, for a long time prior to the accident, and negligently allowed it to remain there; and in the second count, that the city by the use of reasonable diligence, ought to have known of the existence of this pile; and caused its removal from the street. Both counts allege that the appellant's intestate, was at all times in the exercise of reasonable care for his own safety.

The appellee pleaded the general issue, and a jury trial was had. At the close of the evidence, on motion of the appellee, the Court excluded all the evidence from the jury, and instructed them to find the appellee not guilty. The jury returned a verdict in accordance with the instruction. Thereupon the appellant, made a motion for a new trial, which was denied, and the court rendered judgment for the appellee on the verdict. The case is brought to this court on appeal

from the judgment rendered; and the sole question presented for review, is the action of the court in striking out the evidence and directing a verdict for the appellee, at the close of all the evidence in the case.

The testimony given by a nnmber of witnesses for the plaintiff, reasonably and fairly tends to prove, that the pile of cement, hardened sand or debris, had remained in the street in the usual line of travel, about six weeks; and that no effort had been made by the city authorities to remove it, nor to provide a warning by which to direct the attention of travelers passing in vehicles along the street, in the dusk or darkness of the evening, of its presence there; that on the afternoon of the day upon which this accident occurred, the appellant's intestate was riding as a guest in the automobile of his brother who managed and drove it. That the accident occurred in the early dusk of the evening. That the driver of the automobile ran in the usual course of travel on the street; and was in the act of passing around a wagon, which had a hay rackon it, when the automobile collided with the pile mentioned; the presence of which was unknown to the driver. The concussion caused by the collision, threw the occupants out of the automobile and onto the pavement, injuring the appellant's intestate so severely, that he died in consequence of his injuries, within a few hours.

If there is evidence upon which the jury, could "in the eye of the law", reasonably find for the plaintiff, the issue must be determined by a jury. Frazer v Howe 106 Ill. 563; Linnertz v Dorway, 175 Ill. 508; Martin v C. & N. W. Ry. Co. 194 Ill 138.

The evidence also shows, that the automobile was run without lights; and there appears to be a conflict in the evidence, as to whether the automobile, at the time of the accident,

from the judgment rendered; and the sole question presented for review, is the action of the court in striking out the evidence and directing a verdict for the appellee, at the close of all the evidence in the case.

The testimony given by a number of witnesses for the plaintiff, reasonably and fairly tend to prove, that the pile of cement, berdened sand or debris, had remained in the street in the usual time of travel, about six weeks; and that no effort had been made by the city authorities to remove it, nor to provide a warning by which to arrest the attention of travelers passing in vehicles along the street, in the dusk or darkness of the evening, of its presence there; that on the afternoon of the day upon which this accident occurred, the appellant's intestate was riding as a guest in the automobile of his brother who owned and drove it. That the accident occurred in the early dusk of the evening. That the driver of the automobile was in the usual course of travel on the street; and was in the act of passing around a wagon, which had a hay racken it, when the automobile collided with the pile mentioned; the presence of which was unknown to the driver. The concussion caused by the collision, threw the occupants out of the automobile and onto the pavement, injuring the appellant's intestate so severely, that he died in consequence of his injuries, within a few hours.

If there is evidence upon which the jury, could "in the exercise of the last, reasonably find for the plaintiff, the issue must be determined by a jury. Fraser v Howe 108 Ill. 665; Lamoure v Dorney, 175 Ill. 508; Martin v C. & N. W. Ry. Co. 184 Ill 132.

The evidence also shows, that the automobile was run without lights; and there appears to be a conflict in the evidence, as to whether the automobile, at the time of the accident,

was running at a higher rate of speed than was lawful. Appellee insists, that the driver of the automobile, because of his failure to turn on the headlights of his machine, was guilty of negligence per se; and was also guilty of negligence, because of the alleged unlawful speed of the automobile; and while the alleged contributory negligence of thedriver cannot ordinarily be imputed to a guest riding with the driver in an automobile, yet, in this instance, that the decedent himself "omitted that due care which under the circumstances he was bound to take"; and that he could and should have done something to prevent the alleged negligence on the part of the driver.

Assuming the appellee is right, in the position taken, yet, the question as to whether or not the decedent did omit the due care which under the circumstances he was bound to exercise, was one of fact arising from the evidence, and therefore for the jury to pass upon; as would also be, the question whether or not the machine was running at a higher rate of speed than is legally permissible; and then, there would still remain the other important question of fact, which was clearly one for the jury to determine, namely, whether or not the absence of the lights, and the alleged unlawful speed, were, together or separately, contributory, and concurrent causes of the accident.

Where contributory negligence is relied on to defeat an action, the question isusually one for the jury. Roloff v Luer Bro s. Packing & Ice Co. 180 Ill. App. 137; Mueller v Phelps 252 Ill. 630. Illinois Central R. Co. v Anderson, 184 Ill. 394.

We are of the opinion, that all the evidence on the controverted questions of fact, and concerning the alleged contributory negligence of plaintiff's intestate, as wellas

the running at a higher rate of speed than was lawful. Appellee insists, that the driver of the automobile, because of his failure to turn on the headlights of his machine, was guilty of negligence per se; and was also guilty of negligence, because of the alleged unlawful speed of the automobile; and that the alleged contributory negligence of the driver cannot ordinarily be imputed to a guest riding with the driver in an automobile, yet, in this instance, that the decedent himself "realized that due care which under the circumstances he was bound to take"; and that he could and should have done something to prevent the alleged negligence on the part of the driver.

Assuming the appellee is right, in the position taken, yet, the question as to whether or not the decedent did omit the due care which under the circumstances he was bound to exercise, was one of fact arising from the evidence, and therefore for the jury to pass upon; as would also be, the question whether or not the machine was running at a higher rate of speed than is legally permissible; and then, there would still remain the other important question of fact, which was clearly one for the jury to determine, namely, whether or not the absence of the lights, and the alleged unlawful speed, were, together or separately, contributory, and concurrent causes of the accident.

Where contributory negligence is relied on to defeat an action, the question ordinarily one for the jury. Roleff v Lower Bro s. Packing & Ice Co. 180 Ill. App. 127; Mueller v Phelps 252 Ill. 630. Illinois Central R. Co. v Anderson, 164 Ill. 544.

We are of the opinion, that all the evidence on the controverted questions of fact, and concerning the alleged contributory negligence of plaintiff's intestate, as well

the proof of the circumstances under which this pile happened to be in the street, and allowed to remain there; and the evidence upon the question of whether or not this pile in the street was the proximate cause of the injuries, which resulted in the death of appellants intestate, should all have been submitted to the jury; and that the court erred in striking it out, and in directing a verdict, finding the appellee not guilty.

For the reasons stated, the judgment is reversed, and the cause remanded for another trial.

Reversed and remanded.

the jewel of the circumstances under which this pile happened to be in the street, and allowed to remain there; and the arguments upon the question of theft or not. This plaint for arrest was the predicate made of the injurious, which resulted in the death of a peaceable citizenship, should all have been submitted to the jury; and that the model acted in strictly in ever, and in directing a verdict, finding the accusing not guilty.

For the reasons stated, the judgment is reversed, and the cause remanded for further trial.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5946

LaSalle County Electric Railroad Company,

appellant,

vs Appeal from LaSalle.

Alexander P. Wylie, et al appellees.

Dibell, P. J.

~~Appellant~~ Petitioner filed a petition in the circuit court of LaSalle County to condemn a right of way across a farm of 160 acres owned by Alexander P. Wylie, and made defendants thereto said Wylie and his wife and his tenant. There was a trial and a verdict, fixing the compensation to be awarded, and a judgment in favor of ~~appellant~~ petitioner, and the judgment limited the time within which the compensation fixed by the judgment should be paid, as authorized by Section 10 of the Eminent Domain Act, as amended in 1897. The petitioner has never paid the compensation awarded. ~~The same section of the statute~~ provides that in case of failure to pay the compensation within the time fixed, the court, on the application of a defendant, may make such order for payment by the petitioner of costs, expenses and reasonable attorney's fees, paid or incurred by such defendant in defense of the petition, as shall be right ~~and just, and also for the~~ payment of the taxable costs. Wylie filed such a petition after the expiration of the time fixed, and there was a hearing thereunder, and the court allowed him $250 for his reasonable attorney's fees, and ordered that he should recover his costs, and that execution should issue unless paid within a certain time. The railroad company perfected an appeal and obtained a bill of exceptions. It also moved to re-tax the costs of the witnesses for defendants. That motion was heard upon proofs presented. Wylie's tenant, a party defendant, had claimed fees as a witness. The court struck out the allowance of fees to him, and denied

No. 3.

Dallas County Electric Railroad Company,

appellant,

vs.

Appeal from Dallas.

Alexander P. Wylie, et al appellees.

Ridell, P. J.

Appellant filed a petition in the circuit court of Dallas County to condemn a right of way across a farm of 160 acres owned by Alexander P. Wylie, and made defendants thereto said Wylie and his wife and his tenant. There was a trial and a verdict, fixing the compensation to be awarded, and a judgment in favor of appellant, and the judgment limited the time within which the compensation fixed by the judgment should be paid, as authorized by Section 10 of the Eminent Domain Act, as amended in 1897. The petitioner has never paid the compensation awarded. The case contains no statute provides that in case of failure to pay the compensation within the time fixed, the court, on the application of a defendant, may make such order for payment by the petitioner of costs, expenses and reasonable attorney's fees, paid or incurred by such defendant in defense of the petition, as shall be right and just, and also for the payment of the taxable costs.

Wylie filed such a petition after the expiration of the time fixed, and there was a hearing thereunder, and the court allowed him $250 for his reasonable attorney's fees, and ordered that he should recover his costs, and that execution should issue unless paid within a certain time. The railroad company perfected an appeal and obtained a writ of sequestrans. It also moved to re-tax the costs of the witnesses for defendants. That motion was heard upon proofs presented. Wylie's tenant, a party defendant, had claimed fees as a witness. The court struck out the allowance of fees to him, and denied

the motion in allother respects. The railroad company perfected an appeal from said order and obtained a bill of exceptgions. These two appeals have been combined in a single record. The record covers anothermatter decided against the railroad company, but it is not included in the assignment of errors. Appellant contends that no attorneys fees should have been allowed; that the allowance made is not supported by the evidence and is exorbitant; and that fees for only two witnesses for the defence should have been taxed as costs against appellant.

The allowance of attorney's fees by a court rests upon a different basis from any other allowance by a court. While evidence is necessary to show the ordinary and usual charges for like services in that court in cases where such fees are the subject of contract, still this is also treated as a subject on which the court is well qualified to form an opinion and upon which it will exercise an independent judgment. Metheny v Bohn 164 Ill. 495; McMannomy v C. D. & V. R. R. Co. 167 Ill. 497; Lee v Lomax, 219 Ill. 218. ~~In this case~~ Wylie's attorney charged him $350 for the services which he rendered, and the testimony of Wylie showed that he expected to pay that amount. There was testimony that this was the usual and customary fee, and testimony to the contrary. The court allowed $250. So far as the record discloses, the services performed may be briefly stated thus: The petition to condemn was filed on August 26, 1912, and the attorney was thereafter employed by Wylie. An answer was filed September 9, 1912, which was unnecessary and improper. ~~But it amounted~~ to no more than a pleading raising the question whether the petitioner had lawful authority to condemn, and among other things, whether it had shown what kind of a ~~xxxxxxxx~~ railway it proposed to construct and by what power it proposed to operate, and it called attention to the fact that there were no maps, plats

the motion in allother respects. The railroad company perfected an appeal from said order and obtained a bill of exceptions. These two appeals have been combined in a single record. The record covers another decided against the railroad company, but it is not included in the assignment of errors.

Appellant contends that no attorneys fees should have been allowed; that the allowance made is not supported by the evidence and is excessive; and that fees for only two witnesses for the defence should have been taxed as costs against appellant.

The allowance of attorney's fees by a court rests upon a different basis from any other allowance by a court. While evidence is necessary to show the ordinary and usual charges for like services in that court in cases where such fees are the subject of contract, still this is also treated as a subject on which the court is well qualified to form an opinion and upon which it will exercise an independent judgment. Gardner v Dohn 164 Ill. 425; McCormony v C. D. & V. R. R. Co. 147 Ill. 427; Lee v Lomax, 212 Ill. 218. In this case Wylie's attorney charged him $250 for the services which he rendered, and the testimony of Wylie showed that he expected to pay that amount. There was testimony that this was the usual and customary fee, and testimony to the contrary. The court allowed $250. So far as the record discloses, the services rendered may be briefly stated thus: The petition to condemn was filed on August 28, 1912, and the attorney was thereafter employed by Wylie. An answer was filed September 2, 1912, which was unnecessary and improper. But it amounts to no more than a pleading relating the question whether the petitioner had lawful authority to condemn, and among other things, whether it had shown what kind of a railway it proposed to construct and by what power it proposed to operate, and it called attention to the fact that there were no maps, plats

profiles, or plans with the petition. From the whole record it appears that petitioner proposed to take 33 feet next west of the east 33 feet of Wylie's farm. ~~It appears in the record~~ that there was a highway on the ast side of his farm and it is evident that the intention was to take the 33 feet next west of the highway across the xxx whole front of his farm. Wylie's attorney made and argued a motion to dismiss the proceedingx. He moved to strike the answer from the files and this was argued and denied, except as to the fifth paragraph thereof, which raised the question of the absence of the plans,etc. and of the failure to show in the petition whether the road was to be operated by steam, electricity or otherwise. Wylie's attorney ~~xxxxxxx~~ obtained an order requiring the petitioner to file its map or profile or plans, showing the elevation of the road as it passed over his land. He drew and filed a cross petition, claiming damages to the rest of the farm. A jury trial followed, which took five days. The jury defeated Wylie on his cross petition and awarded a less sum as damages than had been offered to Wylie before the suit was begun. Wylie's attorney entered a motion for a new trial, which was argued and denied, and the petitioner had judgment in its favor upon payment of the compensation awarded, and Wylie took orders for an appeal, But seems not to have perfected the appeal. The amount awarded Wylie was $463.50 and the amount awarded the tenant was $10. The cross examination of Wylie by the Petitioner tended to show that he had offered to pay the railroad company $1,000 to go on the opposite side of the road. While the petitioner had the work "Electric" in its corporate name, yet it was organized under the general railroad act, and had lawful authority to operate its railroad by steam, and did not by its petition profess to confine itself to an electric road. It is obvious that the proposition to condemn a strip

profiles, or plans with the petition. From the whole record it appears that petitioner proposed to take 33 feet next west of the east 33 feet of Wylie's farm. It appears in evidence that there was a lighted [illegible] at the time and it is evident that the intention was to take the 33 feet next west of the highway across the [illegible] front of his farm. Wylie's attorney made and argued a motion to dismiss the proceeding. He moved to strike the answer from the files and this was argued and denied, except as to the fifth paragraph thereof, which raised the question of the absence of the plans, etc. and of the failure to show in the petition whether the road was to be operated by steam, electricity or otherwise. Wylie's attorney obtained an order requiring the petitioner to file the bond of [illegible] [illegible] the road is to [illegible] through the tract. Petitioner then filed a second petition, claiming damages to the rest of the farm. A jury trial followed, which took five days. The jury declared Wylie entitled to [illegible] [illegible] plan and been offered to Wylie before the suit was begun. Wylie's attorney entered a motion for a new trial, which was argued and denied, and the petitioner had judgment in its favor upon payment of the compensation awarded, and Wylie took orders for an appeal, but seems not to have perfected the appeal. The amount awarded Wylie was $425.50 and the amount awarded the tenant was $10. The cross examination of Wylie by the Petitioner tended to show that he had offered to pay the railroad company $1,000 to go on the opposite side of the road. While the petitioner had the work "electric" in its corporate name, yet it was organized under the general railroad act, and had lawful authority to operate its railroad by steam, and [illegible] petitioner [illegible] [illegible] road. It is [illegible] [illegible] [illegible] [illegible] [illegible]

of land the whole of one side of a farm of 160 acres between the farm and the highway which might be occupied by a steam railroad presented a serious matter for Wylie. ~~It cannot be treated as a mere suit involving only~~ $472. Wylie's attorney had not only to perform the services above stated, but he had to prepare for the trial and to ascertain not only the law governing such a case but had to see and interview the witnesses by whom could be shown the value of the land taken, and also the effect of the taking upon the value of the rest of the farm, and the proof showed that he made a visit to the premises in preparation for the trial. The fact that the recovery was less than double the sum awarded the attorney is not conclusive, for as said in the McMannomy case, supra: "There are many cases where the whole recovery would not be a fair compensation for the attorney." The determination of the reasonable value of legal services so rendered includes a consideration, not only of the result, but also of the nature of the controversy, the skill and labor required, the responsibility imposed, and the standing and ability of the attorney. Chicago & Southern Traction Co. v Flaherty 222 Ill. 67. If, as laid down in the cases above cited, a court of appeal will exercise an independent judgment as to the reasonable fee in such a case, the same right of independent judgment must obviously belong to the trial court. The judge who made this allowance heard the case from its beginning to its close and was able to form an independent judgment of the services which Wylie's attorney rendered, and the reasonable value thereof. We are of opinion that $250 cannot be said to be an excessive allowance for such legal services involving such responsibilities, where they were performed by an attorney who was competent to protect the ~~xxxxxxxx~~ interests of his client.

Before the trial the attorney for petitioner notified

of land--one [illegible] a [illegible] across [illegible] the Pine and the highway which might be occupied by a steam railroad presented a serious matter for Wylie. It cannot be treated as a [illegible] only $472. Wylie's attorney had not only to perform the services above stated, but he had to prepare for the trial and to ascertain not only the law governing such a case but had to see and interview the witnesses by whom could be shown the value of the land taken, and also the effect of the taking upon the value of the rest of the farm, and the proof showed that he made a visit to the premises in preparation for the trial. The fact that the recovery was less than double the sum asked the attorney is not conclusive, for as said in the [illegible] case, supra: "There are many cases where the whole recovery would not be a fair compensation for the attorney." The determination of the reasonable value of legal services so rendered includes a consideration not only of the result, but also of the nature of the controversy, the skill and labor required, the responsibility imposed, and the standing and ability of the attorney. Chicago & Northern Traction Co. v Flaherty 228 Ill. 87. If, as laid down in the cases above cited, a court of appeal will exercise an independent judgment as to the reasonable fee in such a case, [illegible] in the trial court. The judge who made this allowance heard the case from its beginning to its close and was able to form an independent judgment of the services which Wylie's attorney rendered, and the reasonable value thereof. We are of opinion that $250 cannot be said to be an excessive allowance for such legal services involving such responsibilities, where they were performed by an attorney who was compelled to protect the ~~xxxxxxxx~~ interests of his client.

Before the trial the attorney for petitioner filed

the ~~defense~~ defense that he should apply to the court for an order limiting the number of witnesses whose fees should be taxed against petitioner to two. Petitioner at the trial called three witnesses and Wylie called sixteen or seventeen. The burden of showing that so many witnesses were unnecessary and unreasonable was upon petitioner. It was not shown that these witnesses alltestified upon the same subject, nor upon what different subjects they testified. So far as appears, no motion was made to limit the number of witnesses that might testify upon a given subject. The powerof the court to make such a limitation is discussed fully in Geohegan v Union Elevated R. R. Co. 266 Ill. 482. If the court had been asked to limit the number of witnesses upon a given subject we must presume that the court would have made a proper order on that motion. Some of these witnesses may have testified to the value of the strip taken; others to the general effect of that takkng upon the rest of the farm; and others to the effect of such taking upon the fair market value of the rest of the farm. As the record does not disclose the subjects upon which any witness testified on either side of the case, we must presume in support of the action of the trial court, that the use of that number of witnesses by the respondents was not unreasonable. Wylie will have to pay his attorney $100 more than was allowed him for his attorney's fees, and the petitioner has not paid the compensation awarded, but has abandoned the proceeding. We conclude that the orders appealed from should be affirmed.

Orders affirmed.

The Kansas defense that he should apply to the court for an order limiting the number of witnesses whose fees should be taxed against petitioner to two. Petitioner at the trial called three witnesses and Wylie called sixteen or seventeen. The burden of showing that so many witnesses were unnecessary and unreasonable was upon petitioner. It was not shown that these witnesses all testified upon the same subject, nor upon what different subjects they testified. So far as appears, no motion was made to limit the number of witnesses that might testify upon a given subject. The power of the court to make such a limitation is discussed fully in Geohegan v Union Elevated R. R. Co. 388 Ill. 488. If the court had been asked to limit the number of witnesses upon a given subject we must presume that the court would have made a proper order on that motion. Some of these witnesses may have testified as to the value of the strip taken; others to the general effect of that taking upon the rest of the farm; and others to the effect of such taking upon the fair market value of the rest of the farm. As the record does not disclose the subjects upon which any witness testified on either side of the case, we must presume in support of the action of the trial court, that the use of that number of witnesses by the respondents was not unreasonable. Wylie will have to pay the attorney $100 more than was allowed him for his attorney's fees, and the additional $25 not with the respondents merited, but the dismissed the proceeding. We conclude that the orders appealed from should be affirmed.

Orders affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6067

The People of the State of Illinois.

Defendant in error.

vs Error to Boone.

Michael A. Herbert. Plaintiff in error.

Dibell, P. J.

On December 31, 1914, the states attorney of Boone County filed in the county court an ~~injunction~~ information against Michael A. Herbert and William Peck, containing thirteen counts, wherein they were charged with selling intoxicating liquors in the town of Belvidere when the same was anti-saloon territory. The defendants pleaded not guilty and were tried by a jury. During the trial the information was quashed as to the defendant, Peck. Defendant Herbert was found guilty as charged in counts 1, 4 and 8 of the information. He moved for a new trial and in arrest of judgment and those motions were denied. He was fined $100 under each of said three counts and sentenced to imprisonment in the county jail for 20 days under the first count, for 10 days under the fourth count, and for 10 days under the eighth count, which the judgment recites makes "a total of 40 consecutive days", and was committed to the county jail till the fine and costs were paid at the rate of $1.50 per day for each day's work in the workhouse of the county, or till otherwise legally discharged, and it was ordered that defendant so work accordingly and that his commitment and work for non payment of fine and costs begin at the expiration of said 40 days jail sentence. Herbert has sued out this writ of error to review this judgment.

It is contended that error intervened in the procuring of the jury. The bill of exceptions fails to show

No. 22.

The People of the State of Illinois,

Defendant in error,

vs. Error to Boone.

Michael A. Herbert, Plaintiff in error.

Fishell, P. J.

On December 21, 1914, the states attorney of Boone County filed in the circuit court of said county information against Michael A. Herbert and William Peck, containing three counts, wherein they were charged with selling intoxicating liquors in the town of Belvidere when the same was anti-saloon territory. The defendants pleaded not guilty and were tried by a jury. During the trial the information was amended as to the defendant, Peck. Defendant Herbert was found guilty as charged in counts 1, 4 and 8 of the information. He moved for a new trial and in arrest of judgment and those motions were denied. He was fined $100 under each of said three counts and sentenced to imprisonment in the county jail for 90 days under the first count, for 10 days under the fourth count, and for 10 days under the eighth count, which the judgment recites makes "a total of 40 consecutive days", and was committed to the county jail till the fine and costs were paid at the rate of $1.50 per day for each day's work in the workhouse of the county, or till otherwise legally discharged, and it was ordered that defendant do work accordingly and that his commitment and work for non payment of fine and costs begin at the expiration of said 40 days jail sentence. Herbert has sued out this writ of error to review this judgment.

It is contended that error intervened in the proceeding of the jury. The bill of exceptions fails to show

how the jury was drawn or summoned, or that any error in that respect intervened; It does show that one or more jurymen were called into the jury box from the bystanders, but that was entirely permissible if the regular panel was exhausted, and nothing wqs shown on that subject. Moreover, Herbert filed points in writing with his motion for a new trial and also with his motion in arrest of judgment, and such points did not include anything ,on this subject on either motion. The method of procuring the jury was not preserved for review.

The proof showed that Herbert had procured Two Federal licenses for retailing liquor in Belvidere at two different places. It is urged that the court erred in refusing to permit him to explain why he procured these licenses. The court did sustain objections to leading questions put to him by his counsel on that subject, but he was afterwards permitted to make a full explanation and has nothing of which to complain on that subject.

It is contended by Herbert that the sole proof of his guilt was by two detectives and that they were wholly contradicted by himself and by Peck, his clerk, and that the evidence being evenly balanced, the conviction should not stand. A similar question was presented in People v Conners 246 Ill. 9, and it was held in such a case a verdict of guilty would not be set aside unless the finding was so palpably against the weight of the evidence as to indicate that the verdict was based upon passion or prejudice. But this was not all the evidence of defendant's guilt. He had been a saloon keeper before that territory became dry. He still did business over the same bar and with the same appliances. He claimed to be selling only soft drinks. He had these two Government licenses, permitting him to retail liquor in that territory. Moreover, his testimony disclosed that he had bought

Was the jury was drawn or summoned, or that any error in that respect intervened; It does show that one or more jurymen were called into the jury box from the bystanders, but that was entirely permissible if the regular panel was exhausted, and nothing was shown on that subject. Moreover, Herbert filed points in writing with his motion for a new trial and also with his review in error of judgment, and such points did not include anything on this subject on either motion. The method of procuring the jury was not preserved for review.

The proof showed that Herbert had procured two Federal licenses for retailing liquor in Belvidere at two different places. It is urged that the court erred in refusing to permit him to explain why he procured these licenses. The court did sustain objections to leading questions put to him by his counsel on that subject, but he was afterwards permitted to make a full explanation and has nothing of which to complain on that subject.

It is contended by Herbert that the sole proof of his guilt was by the detectives and that they were wholly contradicted by himself and by Pack, his clerk, and that the evidence being evenly balanced, the conviction should not stand. A similar question was presented in People v Cumeres 246 Ill. 9, and it was held in such a case a verdict of guilty would not be set aside unless the finding was so palpably against the weight of the evidence as to indicate that the verdict was based upon passion or prejudice. But this was not all the evidence of defendant's guilt. He had been a saloon keeper before that territory became dry. He still did business over the same bar and with the same appliances. He claimed to be selling only soft drinks. He had these two Government licenses, permitting him to retail liquor in that territory. Moreover, his testimony disclosed that he had bought

a very large quantity of Edelweiss beer, procured by him from the Schoenhofen Brewing Company, and which was elsewhere shown to be an intoxicating liquor, and which he kept in the basement beneath his place of business. He testified that beer had been prescribed for a disease from which he suffered and that he used this only for himself and for his wife and his sister at home. He gave the number of barrels of bottled beer, approximately, that he bought from week to week and the period of time during which he purchased this beer and approximately the number of bottles in each barrel and the number of bottles that he and his wife and sister drank per day and the number of bottled he had left on hand when he wasindicted. A reasonable computation from his estimates leaves more than 1,000 bottles of beer not accounted for. We entertain no doubt from the evidence that he did sell beer which was intoxicating liquor, during that period. He proved his good character by several witnesses, but that could not prevail over positive evidence of guilt.

It is contended that there was error in the giving of instructions for the people and in refusing instructions for the defendant. The jury were instructed at the instance of the People that the issuance of an internal revenue special tax stamp or receipt by the United States to any person as a retail dealer in liquors or in malt liquors at any place in anti-saloon territory is prima facie evidence of the sale of intoxicating liquor by such person at such place or at any place of business of such person within anti-saloon territory where such receipt is posted,provided a sale of liquor of any kind is proven beyond a reasonable doubt, regardless of the kind of liquor sold. It is argued that the instruction should have required not only the issuance of such receipt, but its posting at his place of business, and there is

a very large quantity of February beer, procured by his firm the Schoenhofen Brewing Company, and which was elsewhere shown to be an intoxicating liquor, and which he kept in the basement beneath his place of business. He testified that beer had been prescribed for a disease from which he suffered and that he used this only for himself and for his wife and his sister at home. He gave the number of barrels of bottled beer, approximately, that he bought from week to week and the period of time during which he purchased this beer and specifically the number of bottles in each barrel and the number of bottles that he and his wife and sister drank per day and the number of bottles he had left on hand when he weaninticted. A reasonable computation from his estimates leaves more than 4,00 bottles of beer not accounted for. We entertain no doubt from the evidence that he did sell beer which was intoxicating liquor, during that period. He proved his good character by several witnesses, but that could not prevail over positive evidence of guilt.

It is contended that there was error in the giving of instructions for the people and in refusing instructions for the defendant. The jury were instructed at the instance of the People that the issuance of an internal revenue special tax stamp or receipt by the United States to any person as a retail dealer in liquors or in malt liquors at any place in anti-saloon territory is prima facie evidence of the sale of intoxicating liquor by such person at such place or at any place of business of such person, within anti-saloon territory where such receipt is posted, provided a sale of liquor of any kind is proven beyond a reasonable doubt, regardless of the kind of liquor sold. It is argued that the instruction should have required not only the issuance of such receipt, but its posting at his place of business, and there is

no proof that either of these receipts was posted inhis place of business/ The instruction is in the exact language of the statute, except as to time, and there was no controversy on that subject, and therefore the omission of that element was harmless. Moreover, defendant caused the court to give the second instruction for defendant which is to the same effect and did not require posting of the notice. If there was any error in giving the instruction for the People it cannot be complained of by the defendant, who obtained an instruction in like terms. While some of the rulings upon the instructions may justly be subject to some criticism, yet we are of opinion that when all the given instructions are considered, the jury was sufficiently and fully instructed and that most of the criticisms made by attorneys for defendant are not well taken.

The judgment is therefore affirmed.

to proof that either of these precepts was posted in this place of business. The instruction is in the exact language of the statute, except as to time, and there was no controversy on that subject, and therefore the omission of that element was harmless. Moreover, defendant causes the court to give the second instruction for defendant which is to the same effect and did not complain pending of the notice. If there was any error in giving the instruction for the People it cannot be considered of by the defendant, the defendant is instructed in his favor. While some of the rulings upon the instructions may justify the subject to some criticism, yet on the whole - taking them when all the given instructions are considered, we find no sufficiently for this reversal and that most of the criticisms made by attorney for defendant are not well taken.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6086

Patrick Moran, appellee

vs Appeal from Grundy.

Florence A. Grim, appellant.

Dibell, P. J.

Moran sued Mrs. Grim before a justice for an alleged breach of a real estate contract and, upon a trial of the case in the circuit court on appeal, had a verdict and a judgment for $105. from which Mrs. Grim appeals.

By the contract which was in writing, Moran was to convey to Mrs. Grim by warranty deed, free of all incumbrances, certail real estate in Morris and was to pay her $250 and she was to convey to Moran by warranty deed, free of all incumbrance, certain other real estate in Morris, and the contract was to be carried into effect on February 15, 1914. Moran brought this suit befor that date. It does not appear that he tendered to Mrs. Grim a warranty deed or $250, or that he had that sum ready to pay to her. He could not maintain this suit unless he was excused from performance by the language and conduct of Mrs. Grim or her agent. That question should have been submitted to the jury under a proper instruction. It may be that neither party was in a position to compel the other party to perform. If Moran was ready and able to perform and Mrs. Grim broke the contract, then the measure of damages was the excess in value, at the time of the breach, of that which Moran was to receive over the value of that which he was to convey and $250, which he was to pay. Dady v Condit 188 Ill. 234; Same v Same, 202 Ill. 488; White v Kiggins, 13[illegible] 130 Ill. App. 404. There was no proof from which the jury could find what those dangers were, if any, and the proof at most only warranted nominal damages. The first instruction given for Moran, authorized the jury, if they found for

Gen. No. [illegible]

Patrick Moran, appellee

vs.

Appeal from [illegible].

Florence A. Grim, appellant.

Hibbs, P. J.

Moran sued Mrs. Grim before a justice for an alleged breach of a real estate contract and, upon a trial of the case in the circuit court on appeal, had a verdict and a judgment for $105, from which Mrs. Grim appeals.

By the contract which was in writing, Moran was to convey to Mrs. Grim by warranty deed, free of all incumbrances, certain real estate in Morris and was to pay her $250 and she was to convey to Moran by warranty deed, free of all incumbrance, certain other real estate in Morris, and the contract was to be carried into effect on February 15, 1914. Moran brought this suit before that date. It does not appear that he tendered to Mrs. Grim a warranty deed or $250, or that he had that sum ready to pay to her. He could not maintain this suit unless he was excused from performance by the language and conduct of Mrs. Grim or her agent. That question should have been submitted to the jury under a proper instruction. It may be that neither party was in a position to compel the other party to perform. If Moran was ready and able to perform and Mrs. Grim broke the contract, then the measure of damages was the excess in value, at the time of the breach, of that which Moran was to receive over the value of that which he was to convey and $250, which he was to pay. Dady v Condit 188 Ill. 534; Same v Same, 209 Ill. 488; White v Kingsley, 130 Ill. App. 104. There was no proof from which the jury could find what those damages were, if any, and the judgment of most only nominal nominal damages. The first instruction given for Moran, authorized the jury, if they found for

plaintiff, to assess such damages as they believed from the evidence the defendant had sustained. This left it to the jury to determine what the true measure or rule of damages was, and was therefore erroneous. We collected many of the authorities upon this subject in Boggs v Iowa Central Railway Company 187 Ill. App. 621. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

plaintiff, he waives such damages as they believed from the evidence the defendants sustained. This left it in the jury to determine what the proximate damage to the plaintiff was, and was therefore erroneous. To illustrate many of the principles here this subject is Duke v Tyne Tested Saliny Company 247 Ill. App. 287. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6089

Olive Moore, appellee

vs Appeal from Kankakee.

George Wingerter, appellant.

Dibell, P. J.

Mrs. Olive Moore brought this suit against George Wingerter under Section 9 of the Dram Shop Act to recover damages for injury to her means of support and property by the sale ~~of~~ and gift of intoxicating liquor to her husband, George Moore, which in the first count of the declaration was alleged to have caused his intoxication and in the second and third counts to have caused his habitual intoxication, which intoxication it was alleged caused great injury to her means of support and to her personal property. The court instructed the jury not to allow anything for injury to her person and that element is not in the case. There was a plea of not guilty, a jury trial, a verdict and a judgment for Mrs. Moore for $500 and Wingerter appeals.

The suit was begun June 4, 1913, and the inquiry was limited to the five years next preceding that date. Appellee and her husband had three married daughters, a married son who lived near them part of the time, a minor daughter who married and went away from home during said five years, and two minor sons. Wingerter lived about four miles east of St. Anne on a farm and raised grapes, and made wine in such quantities that he had it in casks and sold wine at his home, and the plaintiff showed that it was intoxicating. At the beginning of the five years appellee and her husband lived on a farm some distance east of appellant, and after some nine months of the first of said five years had elapsed they removed to St. Anne, where he worked in a tile factory, and after two

Hon. Sir, [illegible]

State Entry, [illegible]

vs

[illegible] Firm Employer.

Omaha Employer, [illegible].

Dissent, T. J.

The Nebr. State Court upheld this suit against Omaha Employer under Section 3 of the Dram Shop Act to recover damages for injury to her means of support and recently by the sale and gift of intoxicating liquor to her husband, Omaha Employer, which in the first count of the declaration was alleged to have caused his intoxication and in the second and third counts to have caused his habitual intoxication, which intoxication it was alleged caused great injury to her means of support and to her personal property. The court instructed the jury not to allow anything for injury to her person and that element is not in the case. There was a plea of not guilty, a jury trial, a verdict and a judgment for Mrs. Moore for $500 and Wingerter appeals.

The suit was begun June 4, 1913, and the injury was limited to the five years next preceding that date. Appellee and her husband had three married daughters, a married son who lived near them part of the time, a minor daughter who married and went away from home during said five years, and two minor sons. Wingerter lived about four miles east of Tekamah on a farm and raised grapes, and made wine in much quantities that he put it in casks and sold wine at his home, and the plaintiff showed that it was intoxicating. At the beginning of the five years appellee and her husband lived on a farm some distance east of Tekamah, and after some nine months of the first of said five years had elapsed they removed to Mt. Ahmo, where he worked in a tile factory, for about two

years they moved to Witchert, two and one half miles north of St. Anne, where they continued to live the rest of the said five years.

Appellee proved that her husband was an habitual drunkard and appellant supplemented that by further evidence to the same effect. He was an habitual drunkard during all of said five years. Appellee proved without contradiction that a part of his intoxication was produced by wine which he bought at appellant's home, either of appellant or of some of his children, and which said husband paid for. Appellant contends that only five such sales are proved in the five years. We have carefully read the evidence in the record and this is an inadequate statement of the proof. There seem to have been seven distinct sales proved, but it was also proved that during the first nine months of said five years he was drunk at least twelve times, or about once every three weeks, upon appellant's wine, and that these drunken spells lasted from three days to a week each, during all of which time he was entirely incapacitated for work. There was proof that at later times when he lived at Witchert, he was frequently intoxicated on wine of appellant. True, on cross examination of the witnesses by whom this was proved, their statement that George Moore told them he got the wine from appellant was excluded, but two of these witnesses also testified that they saw the wine which he had in the house at Witchert, and upon which he became intoxicated fromtime to time, and that they knew appellant's wine from other wine and that this was appellant's wine. There was no contradiction of any of this evidence and it is clear that appellant personally and by his children acting at his home sold George Moore intoxicating liquor, the use of which caused his intoxication and contributed to keep him an habitual drunkard. At least two of these sales were made to

Hon. Mr. Moore

Cities Service, Limited

vs.

Kansas City Gas Company.

Omaha Elevators, Limited.

Stone, J. :

Mr. Riley Moore brought this action against Georgia Hargrave under Section 2 of the Dram Shop Act to recover damages for injury to her means of support and necessary by the sale and gift of intoxicating liquor to her husband, George Moore, which in the first count of the declaration was alleged to have caused his intemperate and in the second and third counts to have caused his habitual intoxication, which intoxication it was alleged caused great injury to her means of support and to her personal property. The court instructed the jury not to allow anything for injury to her person and that element is not in the case. There was a plea of not guilty, a jury trial, a verdict and a judgment for Mrs. Moore for $500 and Hargrave appeals.

The suit was begun June 4, 1913, and the injury was limited to the five years next preceding that date. Appellee and her husband had three married daughters, a married son who lived near them part of the time, a minor daughter who married and went away from home during said five years, and two minor sons. Hargrave lived about four miles east of Ft. Scott on a farm and raised crops, and made wine in such quantities that he had it in casks and jug wine at his home, and the plaintiff showed that it was intoxicating. At the beginning of the five years appellee and her husband lived on a farm some distance east of Ft. Scott, and after some nine months of the first of said five years had elapsed they removed to Ft. Scott, where he worked in a tile factory, and after two

years they moved to Witchert, two and one half miles north of St. Anne, where they continued to live the rest of the said five years.

Appellee proved that her husband was an habitual drunkard and appellant supplemented that by further evidence to the same effect. He was an habitual drunkard during all of said five years. Appellee proved without contradiction that a part of his intoxication was produced by wine which he bought at appellant's home, either of appellant or of some of his children, and which said husband paid for. Appellant contends that only five such sales are proved in the five years. We have carefully read the evidence in the record and this is an inadequate statement of the proof. There seem to have been seven distinct sales proved, but it was also proved that during the first nine months of said five years he was drunk at least twelve times, or about once every three weeks, upon appellant's wine, and that these drunken spells lasted from three days to a week each, during all of which time he was entirely incapacitated for work. There was proof that at later times when he lived at Witchert, he was frequently intoxicated on wine of appellant. True, on cross examination of the witnesses by whom this was proved, their statement that George Moore told them he got the wine from appellant was excluded, but two of these witnesses also testified that they saw the wine which he had in the house at Witchert, and upon which he became intoxicated fromtime to time, and that they knew appellant's wine from other wine and that this was appellant's wine. There was no contradiction of any of this evidence and it is clear that appellant personally and by his children acting at his home sold George Moore intoxicating liquor, the use of which caused his intoxication and contributed to keep him an habitual drunkard. At least two of these sales were made to

They moved to Witchert, two and one half miles north of St. Anne, where they continued to live the rest of his and her years.

Evidence proved that her husband was an habitual drunkard and witnesses supplemented that by further evidence to the same effect. He was an habitual drunkard during all of such time. Appellee proved without contradiction that a part of his intoxication was produced by wine which he bought at appellant's home, either of appellant or of some of his children, and which said husband paid for. Appellant contends that only five such sales are proved in the five years. We have carefully read the evidence in the record and this is an inadequate statement of the proof. There seem to have been seven distinct sales proved, but it was also proved that during the first nine months of said five years he was drunk at least twelve times, or about once every three weeks, upon appellant's wine, and that these drunken spells lasted from three days to a week each, during all of which time he was entirely incapacitated for work. There was proof that at later times when he lived at Witchert, he was frequently intoxicated on wine of appellant. True, on cross examination of the witnesses by whom this was proved, their statement that George Moore told them he got the wine from appellant was excluded, but two of these witnesses also testified that they saw the wine which he had in the house at Witchert, and upon which he became intoxicated frequently to them, and that they knew appellant's wine from other wine and that wine was appellant's wine. There was no contradiction of any of this evidence and it is clear that appellant personally or by his children selling at his home said George Moore intoxicating liquor, the use of which caused his intoxication and continued to keep his an habitual drunkard. At least two of these sales were made to

George Moore when he was already intoxicated.

The record is full of proof of the extreme poverty of appellee and her husband and of his failure to supply her most ordinary wants and fully justifies the conclusion that his habitual drunkenness was the cause thereof. When any money was earned on the land they worked, it was because appellee and her minor children worked in the fields. Her married daughters furnished the clothing for herself and her minor children, a duty which it is obvious her husband could have performed but for his habits of intoxication. The proofs justified the instruction given for appellee which submitted the question of exemplary damages to the jury. It is very evident however, that the jury did not award exemplary damages. The verdict is very moderate for the actual damages shown by the evidence.

Appellant was permitted to prove that others contributed to the habitual intoxication of George Moore; that he was seen lying drunk on the river bank in Momence with whiskey bottles in his pocket; that he was seen drinking whiskey in saloons in Momence and in St. Anne; but the court did not permit proof of the names of such saloon keepers. Appellant was permitted more evidence on that subject than he was entitled to. It was held in Emory v Addis 71 Ill. 273, a similar case, that it would avail nothing to the defendant in that case, who had sold intoxicating liquors to the husband of plaintiff and caused his intoxication, that other persons also sold him liquor which contributed to his intoxication. To the same effect is Earp v Lilly, 217 Ill. 582. So also the fact that appellee's husband was an habitual drunkard before the five years covered by this suit does not preclude a recovery Danley v Hibbard, 222 Ill. 88; Leverenz v Stevens, 124 Ill. App. 401. Appellee was present in a buggy or wagon perhaps

years. They moved to Witchart, two and one half miles north of St. Anne, where they continued to live the rest of the said five years.

Appellee proved that her husband was an habitual drunkard and appellant supplemented that by further evidence to the same effect. He was an habitual drunkard during all of said five years. Appellee proved without contradiction that a part of his intoxication was produced by wine which he bought at appellant's house, either of appellant or of some of his children, and within half hundred yards for. Appellant admitted that sale. Five such sales are proved in the five years. We have carefully read the evidence in the record and this is an inadequate statement of the proof. There seem to have been seven distinct sales proved, but it was also proved that during the first nine months of said five years he was drunk at least twelve times, or about once every three weeks, upon appellant's wine, and that these drunken spells lasted from three days to a week each, during all of which time he was entirely incapacitated for work. There was proof that at later times when he lived at Witchart, he was frequently intoxicated on wine of appellant. True, on cross examination of the witnesses by whom this was proved, their statement that George Moore told them he got the wine from appellant was excluded, but two of these witnesses also testified that they saw the wine which he had in the house at Witchart, and upon which he became intoxicated previous to time, and that they knew appellant's wine from other wine and that such was appellant's wine. There was no contradiction of any of this evidence and it is clear that appellant personally, or by his children acting at his home, sold George Moore intoxicating liquor, the use of which caused his intoxication and continued to keep him an habitual drunkard. At least two of these sales were made

George Moore when he was already intoxicated.

The record is full of proof of the extreme poverty of appellee and her husband and of his failure to supply her most ordinary wants and fully justifies the conclusion that his habitual drunkenness was the cause thereof. When any money was earned on the land they worked, it was because appellee and her minor children worked in the fields. Her married daughters furnished the clothing for herself and her minor children, a duty which it is obvious her husband could have performed but for his habits of intoxication. The proofs justified the instruction given for appellee which submitted the question of exemplary damages to the jury. It is very evident however, that the jury did not award exemplary damages. The verdict is very moderate for the actual damages shown by the evidence.

Appellant was permitted to prove that others contributed to the habitual intoxication of George Moore; that he was seen lying drunk on the river bank in Momence with whiskey bottles in his pocket; that he was seen drinking whiskey in saloons in Momence and in St. Anne; but the court did not permit proof of the names of such saloon keepers. Appellant was permitted more evidence on that subject than he was entitled to. It was held in Emory v Addis 71 Ill. 273, a similar case, that it would avail nothing to the defendant in that case, who had sold intoxicating liquors to the husband of plaintiff and caused his intoxication, that other persons also sold him liquor which contributed to his intoxication. To the same effect is Earp v Lilly, 217 Ill. 582. So also the fact that appellee's husband was an habitual drunkard before the five years covered by this suit does not preclude a recovery. Danley v Hibbard, 222 Ill. 88; Leverenz v Stevens, 124 Ill. App. 401. Appellee was present in a buggy or wagon perhaps

George Hodge was his primary creditor.

The second is full of proof of the extreme poverty of appellee and her husband and of his failure to supply her most ordinary needs, and fully justifies the conclusion that his habitual drunkenness was the cause thereof. When any money was raised on the land they worked, it was because appellee had her minor children [illegible] on the fields. She [illegible] furnished the clothing for herself and her minor children, a fact which it is obvious the defendant could have performed but for his habits of intoxication. The proofs justified the instruction given for appellee which submitted the question of exemplary damages to the jury. It is very evident, however, that the jury did not award exemplary damages. The verdict is very moderate for the actual damages shown by the evidence.

Counsel was anxious to prove that there existed belief to the habitual intoxication of George Moore; that he was seen lying drunk on the river bank in Momence with whiskey bottles in his pocket; that he was seen drinking whiskey in saloons in Momence and in St. Anne; but the court did not permit proof of the names of such saloon keepers. Appellant was permitted more evidence on that subject than he was entitled to. It was held in Emery v Addis 74 Ill. 273, a similar case, that it would avail nothing to cross-examine in such case, who had sold intoxicating liquors to the husband of plaintiff and caused his intoxication, that other persons also sold him liquor which contributed to his intoxication. To the same effect is Earp v Hilly, 117 Ill. 328. So also the last case quoted's decision was on rehearing overruled before the full court. Appeared by this suit was not prosecuted a fraudulently. Tunley v Hibbard, 224 Ill. 98; Leverone v Stevens, 224 Ill. App. 401. Appellee was present in a buggy or wagon perhaps

three times when her husband bought this wine at appellant's farm and did not protest then against it. We are of opinion that her silence does not debar her from this suit, when all the evidence is considered. Her husband was very wilful. She had repeatedly sought to influence him not to buy or use intoxicating liquor, but without avail. On one of those occasions she went along in the night time because he insisted on taking their little boy and she went to avoid any injury to the child. She took steps to have appellant notified by a lawyer not to sell liquor to her husband, but was unable to show that the notice had in fact been given.

Complaint is made of the 9th. instruction, given for appellee which after submitted to the jury the question whether Moore during said five years became an habitual drunkard and whether within said five years appellant sold and delivered him intoxicating liquor, and whether he drank the same and whether the drinking thereof contributed to his becoming an habitual drunkard, and whether by reason of such habitual drunkenness the plaintiff was injured in her means of support, then told the jury that if they further believed from the evidence that during said period other persons sold and delivered intoxicating liquors to Moore and that he drank the same and that the drinking thereof contributed to his becoming an habitual drunkard, yet under the law appellant would be liable for the acts of all other persons, who contributed to such habitual intoxication by selling and delivering intoxicating liquors to Moore. This instruction is supported by Harp v Lilly, supra, where the court said: "It is apparent the liability created by said section for making an habitual drunkard of appellee's husband, and thereby injuring her in her property and means of support, cannot be apportioned between the several dram-shop keepers who furnished the intoxicating liquors which

three times when her husband bought this wine at appellant's farm and did not present their quarrels to it. We are of opinion that her silence does not deter her from doing it, even all the evidence is considered. Her husband was very ugly. He had repeatedly sought to induce him not to use intoxicating liquor, but without avail. On one occasion she was very alone in the night time because he insisted on taking their little boy and she went to avoid any injury to the child. She took steps to have appellant notified by a letter not to sell liquor to her husband, but was unable to show that the letter had in fact been given.

Complaint is made of the 8th instruction, given for appellee which after submitted to the jury the question whether Moore, while in the state described, drank and relieved his thirst and the appellant sold and delivered him intoxicating liquor, and whether he drank the same and whether his drinking thereof contributed to his becoming an habitual drunkard, and whether or reason of such habitual drunkenness the plaintiff was injured in her means of support, then told the jury that if they further believed from the evidence that during said a ride other persons sold and delivered intoxicating liquors to Moore, and that he drank the same and that the drinking thereof contributed, to his becoming an habitual drunkard, yet under the law appellant could be liable for the acts of all other persons, the contributed to such habitual intoxication by selling and delivering intoxicating liquors to Moore. This instruction is supported by "ability, supra", where the court said: "It is somewhat a liability created by act; section "for making an habitual drunkard of appellee's husband, and the by injuring her in her property and means of support, means be substituted for the proximate drunkenness which furnished the intoxicating liquors which

made of him an habitual drunkard, but that each person who assisted in bringing about that habitual condition must be held, under the statute, liable for the acts of all persons who contributed, by the furnishing of intoxicating liquors, to that habitual condition in the husband."

The court refused four instructions requested by appellant The first was to the effect that if Moore became intoxicated by intoxicating liquors obtained from others and by reason thereof appellee was injured in person, property or means of support, and if appellant sold intoxicating liquors to Moore and he thereby became intoxicated, then before appellee could recover, she must prove that the intoxication caused by appellant contributed to the injury to her person, property or means of support. This was an attempt to put upon her the burden of proving an injury from the use of appellant's liquor, separate from that produced by the liquor s sold Moore by others, a thing which perchance she might be unable to do and a burden she was not required to assume under the principles announced in Earp v Lilly supra, and other cases. The second refused instruction was on the basis that the wine sold by appellant was not intoxiating and that Moore mixed said wine with other liquors and thereby became intoxicated. There was no proof to authorize the giving of such an instruction. The third refused instruction was intended to cause the jury to consider the proof that Moore became intoxicated by liquors sold him by others in mitigation of damages, and was properly refused under the authorities already cited. The fourth refused instriction assumed that there was evidence that appellee purchased from appellant intoxicating liquors for her husband and that such fact might be considered in mitigation of damages. There was no evidence upon which to base such an instruction. Certain

made of his an habitual drunkard, but that such person who resisted in bringing about that habitual condition must be held, under the statute, liable for the acts of all persons who contributed, by the furnishing of intoxicating liquors, to such habitual condition on the part of.'

The court refused four instructions requested by appellant. The first was to the effect that if Moore became intoxicated by intoxicating liquors obtained from others and to reason thereof appellee was injured in person, property or means of support, and if appellant sold intoxicating liquors to Moore and to those whose intoxication, that taken appellee could recover, she must prove that the intoxication caused by appellant contributed to the injury to her person, property or means of support. This was an attempt to put upon her the burden of proving an injury from the use of appellant's liquor, separate from that produced by the liquor sold Moore by others, a thing which perchance she might be unable to do and a burden she was not required to assume under the principles announced in Case v. Kelly supra, and other cases. The second requested instruction was on the basis that the wine sold by appellant was not intoxicating and that Moore mixed said wine with other liquors and thereby became intoxicated. There was no proof to authorize the giving of such an instruction. The third refused instruction was intended to cause the jury to consider the proof that Moore became intoxicated by liquors sold him by others in mitigation of damages, and was properly refused under the authorities already cited. The fourth refused instruction assumed that there was evidence that appellee sustained from appellant intoxicating liquors for her husband and that such fact might be considered in mitigation of damages. There was no evidence upon which to base such an instruction. Certain

other instructions requested by appellant were modified and given. We find no error in these modifications nor in the other rulings of the court upon the instructions.

The judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6091.

James Brack, appellee

vs Appeal from Putnam

B. F. Berry Coal Co. appellant.

Dibell, P. J.

Appellee was very seriously injured by the fall of a rock in the roof of a mine of appellant while appellee was at work underneath said rock, as a servant of appellant. Appellee brought suit against appellant to recover damages for said injuries, and had a verdict for $15,000 on which judgment was entered. We reversed that judgment in Brack v B. F. Berry Coal Co., 187 Ill. App. 609 because an instruction for appellee was not sufficiently modified, and because an instruction requested by appellant was improperly refused, and because of a lack of certain necessary evidence. The case has been tried again, and appellee has had a verdict and a judgment for $14,000 and this is an appeal from that judgment. The substance of the charge in the declaration is that the roof of the room in which appellee was mining coal was in an unsafe and dangerous condition; that appellee desired to use certain props, caps and timbers to secure said roof; that appellant wilfully failed to provide appellee with a supply of such props, etc. though proper demand as provided by law had been made upon appellant therefor; and that because of such non-compliance by appellant with the provisions of the law, the rock fell upon him and he was injured.

The sixth clause of article 30 of Chapter 93 of the Revised Statutes, pertaining to Mines and Mining, requires the mine manager to "provide a sufficient number of props, caps and timbers, when demanded, delivered on the miner's cars at the usual place, in suitable lengths and dimensions

Can. Ys. 0001.

James Grant, appellee

vs. Appeal from Putnam

R. V. Berry Coal Co. appellant.

Dissell, J. 1.

Appellee was very seriously injured by the fall of a rock in the roof of a mine of appellant while appellee was at work underneath said rock, as a servant of appellant. Appellee brought suit against appellant to recover damages for said injuries, and had a verdict for $15,000 on which judgment was entered. We reversed that judgment in Brock v R. V. Berry Coal Co., 187 Ill. App. 609 because an instruction for appellee was not sufficiently modified, and because an instruction requested by appellant was improperly refused, and because of a lack of certain necessary evidence. The case has been tried again, and appellee has had a verdict and a judgment for $14,000 and this is an appeal from that judgment. The substance of the charge in the declaration is that the roof of the room in which appellee was mining coal was in an unsafe and dangerous condition; that appellee desired it was certain prope, cope and timbers to secure said roof; that appellant wilfully failed to provide appellee with a supply of such prope, etc. though proper demand as provided by law had been made upon appellant therefor; and that because of such non-compliance by appellant with the provisions of the law, the rock fell upon him and he was injured.

The sixth clause of article 20 of Chapter 93 of the Revised Statutes, pertaining to Mines and Minerals, requires the mine manager to "provide a sufficient number of prope, cope and timbers, when demanded, delivered on the miner's care at the usual place, in suitable lengths and dimensions

for the securing of the roof by the miners." On a former appeal it was contended successfully that there was no adequate proof of a proper demand by appellee or his buddy. On the present appeal, it is not contended that there is any lack of proof in that respect. It is contended that inasmuch as appellee testified at this trial to something additional to his testimony at the former trial, and also varied slightly in dates, therefore the jury ought not to have believed him, and this court ought not to believe him. The main contention of appellant, however, is that appellee had plenty of suitable props at the time he was injured and failed to use them, and that as appellant had furnished, and there were in and near his room, plenty of props for his use, the charge was not sustained; and also that the damages are excessive. Complaint is also made that the court erroneously refused to admit in evidence rule 10 offered by appellant, and gave an erroneous instruction requested by appellee.

There were certain props within reach of appellee. Many witnesses testified concerning them. We deem it unnecessary to burden this opinion with a discussion of the relative merits of the testimony of each witness on that subject, but think it sufficient to say in that respect that there is in the record a clear preponderance of evidence that the only props in that vicinity accessible to appellee before his injury were props that had been broken or were crooked and unfit fo be used, and that appellee had failed to supply the needed props as demanded. Appellant contends that as appellee supposed the stone above him in the roof where he xxxk was at work would not fall, and that it was safe for him to work under it, therefore, if suitable props had been supplied, he would not have used them, and therefore his injury was not due to the failure to supply props. The proof shows that the

for the assuring of the roof by the miners." On a former appeal it was contended successfully that there was no adequate proof of a proper demand by appellee or his buddy. On the present appeal, it is not contended that there is any lack of proof in that respect. It is contended that testimony as appellee testified at this trial is materially additional to his testimony at the former trial, and also varies slightly in dates, therefore the jury ought not to have believed him, and this court ought not to believe him. The main contention of appellant, however, is that appellee had plenty of suitable rope at the time he was injured and failed to use them, and that as proximate and foreseeable, and there was in use near his room, plenty of rope for his use, the charge was not sustained; and also that the damages are excessive. Complaint is also made that the court erroneously refused to admit in evidence rule 10 offered by appellant, and gave an erroneous instruction requested by appellee.

There were certain ropes within reach of appellee. Many witnesses testified concerning them. We deem it unnecessary to burden this opinion with a discussion of the relative merits of the testimony of each witness on that subject, but think it sufficient to say in that respect that there is in the record a clear preponderance of evidence that the only ropes in that vicinity accessible to appellee before his injury were ropes that had been broken or were crooked and unfit to be used, and that appellee had failed to supply the needed ropes as demanded. Appellant contends that as a miner supposed the stone above him in the roof where he was at work would not fall, and that it was safe for him to work under it, therefore, if suitable ropes had been supplied, he would not have used them, and therefore his injury was not due to the failure to supply ropes. The proof shows that the

rock above had slightly slipped and appellee knew it before he went to work under it that morning, and that the distance for which it was unsupported was such that appellee and his buddy that morning wished to put props underneath it to prevent any danger of its falling, and that they did not put props there before working because xxxx they had none. We are therefore of the opinion that the evidence made a case for the plaintiff, and justified a verdict for him.

The court permitted proof that rules had been posted by appellant and permitted the rules to be produced in the court room, but refused to permit rule 10 to be read in evidence to the jury. The rule was so framed as to permit the coal company to wilfully violate the statute, and yet give the mine operator a perfect defense against any miner who might beinjured by such wilful violation of the statute. The rule was void because it was against public policy. Consolidated Coal Co. v Lunbak, 196 Ill. 594; Himrod Coal Co. v Clark 197 Ill. 514; Campbell v C. R. I. & P? Ry. Co. 149 Ill. App. 22 120, and 243 Ill. 620. The court properly refused to admit the rule in evidence.

The fourth instruction given for appellee is not subject to the criticism made upon it. The omission supposed, does not, in fact exist. The element alleged to have been omitted is stated in the instruction, though briefly. That element was fully stated also in instructions 21, 22, 23 and30 given for appellant.

It is alleged that the damages are excessive, The Only reason urged for that contention is that if appellee had died from the injury, his next of kin could not have recovered for their loss more than $10,000. A suit for the benefit of the next of kin would not have permitted a recovery for the pain and suffering of appellee. Appellee was, in fact,

work above that stipulated and therefore then it takes on that to work after it that morning, and that the distance for which it was unsupported was such that appellee and his muddy that morning wished to put prope underneath it to prevent any danger of its falling, and that they did not put prope there before working because they had none. We are therefore of the opinion that the evidence made a case for the plaintiff, and justified a verdict for him.

The court rewritten proof that rules had been posted by appellant and permitted the rules to be produced in the court room, but refused to permit rule 10 to be read in evidence to the jury. The rule was so framed as to permit the coal company to wilfully violate the statute, and yet give the mine operator a perfect defense against any miner who might sustained by such wilful violation of the statute. The rule was void because it was contrary public policy. Consolidated Coal Co. v Dunkel, 124 Ill. 384, Stewart Coal Co. v Clark 187 Ill. 314; Chicago & E. I. R. R. Co. v Pfeifer, 108 Ill. App. 28, affd 208 Ill. 290. The court properly refused to admit the rule in evidence.

The fourth instruction given for appellee is not subject to the criticism made upon it. The omission supposed, does not, in fact exist. The element alleged to have been omitted is stated in the instruction, though briefly. This element was fully stated also in instructions 21, 22, 23 and 30 given for appellant.

It is alleged that the damages are excessive. The only reason urged for that contention is that if appellee had died from the injury, his next of kin could not have recovered for their loss more than $15,000. A book for the benefit of the next of kin would not have remitted a verdict for the pain and suffering of appellee. Appellee was, in fact,

so seriously injured that it is very strange that he lived. His lower limbs and the lower part of his body were completely paralyzed. He had no control over his bowels or his bladder. He suffered very great pain. He was under constant treatment for avery long time. He is a helpless cripple and will never be able to do any work again. He was 38 years old when injured, and was at that time a strong and healthy man. Obviously no court can say that $14,000 is an excessive award for such pain and suffering, and for the deprivation of everything in life worth having, except a bare existence.

The judgment is affirmed.

so seriously injured that it is very strange that he lived. His legs from the lower part of his body were completely paralyzed. He had no control over his bowels or his bladder. He suffered very great pain. He was under constant treatment for every long time. He is a helpless cripple and will never be able to do any work again. He was 28 years old when injured, and was in fact then a strong and healthy man. Obviously the court was not that $21,000 is an excessive award for such pain and suffering, and the use [illegible] in life's very limited, seems a wise reference.

The judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6105.

Gus Danzeiser, appellee

vs Appeal from Peoria.

Robert D. Clarke, appellant.

Dibell, P. J.

Danzeiser sued Clarke before a justice and had a judgment for $300 by default. Clarke appealed to the circuit court of Peoria County, where there was a jury trial and a verdict and a judgment for plaintiff for $150. from which defendant appeals.

Appellee obtained a patent on a railroad switch frog and thereafter made a written contract with appellant, signed by both parties, in which appellee made appellant his attorney in fact to assign sell and deliver said patent to an Illinois corporation. The rest of the contract is mainly as follows: "in consideration of the confidence reposed in me and in consideration of the advance in money which I hereby bind myself to make, and for that which I have already made, I agree with said Gus Danzeiser to at once furnish all the necessary capital to construct, deliver and install, in different parts of the United States, at least thirty (30) of said devices and to furnish the necessary expenses to said Gus Danzeiser to supervise and direct the installation of the same, and if a demonstration and test of the said thirty devices so made and installed show the practicability of such device then and in that event I will organize a corporation with sufficient vapital to manufacture and sell and dispose of said devices in such quantities as the market therefor might demand.

In the organization of such corporation I bind myself that the stock thereof shall be fully paid up, and that said Gus Danzeiser shall receive forty five (45%) per cent of same,

Gen. No. 8106.

Gus Dunmeier, Appellee

vs

Appeal from Peoria.

Robert E. Clarke, appellant.

Mirell, P. J.

Dunmeier sued Clarke before a justice and had a judgment for $200 by default. Clarke appealed to the circuit court of Peoria County, where there was a jury trial and a verdict and a judgment for plaintiff for $130, from which defendant appeals.

Appellee obtained a patent on a railroad switch frog and thereafter made a written contract with appellant, signed by both parties, in which appellee made appellant his attorney in fact to assign sell and deliver said patent to an Illinois corporation. The rest of the contract is mainly as follows:

"In consideration of the confidence reposed in me and in consideration of the advance in money which I hereby bind myself to make, and for that which I have already made, I agree with said Gus Dunmeier to at once furnish all the necessary capital to construct, deliver and install, in different parts of the United States, at least thirty (30) of said devices and to furnish the necessary expenses to said Gus Dunmeier to survey and direct the installation of the same, and if a demonstration and test of the said thirty devices so made and installed show the practicability of such device then and in that event I will organize a corporation with sufficient capital to manufacture and sell and dispose of said devices in such quantities as the market therefor might demand.

In the organization of such corporation I shall specially limit the stock thereof which is fully paid up, and that said Gus Dunmeier shall receive Twenty Five (25%) per cent of same,

the remaining fifty five (55%) per cent thereof to belong to my self and the said John H. Carroll, or our several assigns.

I further bind myself as aforesaid to said Gus Danzeiser- to have such corporation enter into a contract with him by the terms of which he shall receive all necessary expenses for himself in the supervising and directing the manufacture and installation of said devices, and as an additional compensation shall receive from said corporation annually, a sum equal to ten (10%) per cent of the net profits of said corporation after organized."

The said thirty devices were manufactured in Milwaukee and shipped to Peoria. Appellant paid appellee $20 for his expenses to go to Milwaukee and superintend their construction and see that they were properly made. By the time the freight had been paid and the devices delivered in Peoria, appellant had expended about $600 thereon. Thereafter appellee made trips to Chicago, StLouis, Denver and Kansas City, and incurred various expenses for railroad fare, hotel bills, cigars and other matters, and ran up a bill of $235.90, and deducting therefrom the $20 he had received from appellant for a trip to Milwaukee to see that the devices were properly manufactured, his remaining expenses amounted to $215.90. He claimed that under the written contract above set out, appellant was liable to refund him that expense, and brought this suit therefor before said justice, intending xx we may assume, to remit all of his claim above $200.

If appellant is liable for these expenses under said contractm, the present judgment cannot stand. All that appellant could be held for under the contract in any event is "necessary expenses". The witness did not know how many days he spent in any of those places, what hotels he stopped at, what rates per day he paid nor any other item, and therefore he furnished

the remaining fifty five (55%) per cent thereof to belong to my self and the said John H. Carroll, or our several heirs,

I further bind myself as aforesaid to said One Hundred-to have such corporation enter into a contract with him by the terms of which he shall receive all necessary expenses for himself in the supervising and directing the manufacture and installation of said devices, and as an additional compensation shall receive from said corporation annually, a sum equal to ten (10%) per cent of the net profits of said corporation after organized."

The said thirty devices were manufactured in Milwaukee and shipped to Peoria. Appellant paid appellee $20 for his expenses to go to Milwaukee and superintend their manufacture and see that they were properly made. By the time the freight had been paid and the devices delivered in Peoria, appellant had expended about $600 thereon. Thereafter appellee made trips to Chicago, St.Louis, Denver and Kansas City, and incurred various expenses for railroad fare, hotel bills, cigars and other matters, and ran up a bill of $235.30, and deducting therefrom the $20 he had received from appellant for a trip to Milwaukee to see that the devices were properly manufactured, his remaining expenses amounted to $215.30. He claimed that under the written contract above set out, appellant was liable to refund him that expense, and brought this suit therefor before said justice, intending as we may assume, to remit all of his claim above $200.

If appellant is liable for these expenses under said contract, the present judgment cannot stand. But that appellant could be held for under his contract in any event is "necessary expenses", The witness did not know how many days he spent in any of these places, what hotels he stopped at, what rates per day he paid nor any other item, and therefore he furnished

court and jury no means of knowing whether the expenses in curred were necessary and were reasonable or the opposite. For example, he charges $30 for expenses at a hotel in Chicago, but he does not know at what hotel he stayed, what rate he was charged, or whether he stayed there more than two days. He may have been there ten days and lived economically or he may have been there only two days and lived very extravagantly and at a rate which would not be necessary or reasonable. He incurred a hotel expense at Denver of $57.50 and could give no better account of the expenditure.

Appellee was engaged during xxx xx that trip in trying to interest railroad men in this devise, which he had invented. He did not sell any of them. He did not install any of them. The language of the contract plainly says that appellant was to furnish appellee the necessary expenses to supervise and direct the installation of thirty of those switch frogs. The expenses for which this suit was brought were not incurred in supervising and directing the installation of those thirty switch frogs or any of them. Therefore appellant is not liable under this contract for the expenses for which appellee brings this suit. Appellee expressly testified that he relied only on this written contract to recover in this suit. The argu ment of appellee's counsel shows that it would be very agreeable to appellee to have had a provision in the contract that appellant should pay his expenses in travelling about the United States in an effort to induce railroad men to become interested in the device, but that provision was not inserted. Appellee was to have nearly one half of the stock in the cor poration which was to manufacture the device and was to have ten per cent of the net profits, so that he was interested on his own account in trying to secure the approval of the device by railroad men. As the contract does not make appellant

liable for those expenses, the judgment is reversed.

Judgment reversed.

Finding of facts to be incorporated in the judgment.

We find from the evidence that under the contract sued upon, appellant is not liable to refund to appellee the expenses for which appellee brought this suit.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6110

Anna Weltz, appelles

vs Appeal from Carroll.

John R. Connell, appellant.

Dibell, P. J.

This case was before this court at the April Term 1914, and our opinion, reversing and remanding the cause appears in Weltz v Connell, 186 Ill. App. 336, to which we refer for a statement of the facts. That opinion reversing and remanding the cause, was based upon the refusal of the court to give instruction No. 17, requested by appellant, which would have told the jury that, before the plaintiff could recover, she must prove by a preponderance of the evidence that misrepresentations relative to the land in question were made by the defendant, that such misrepresentations were false and known by the defendant to be false when made, that the plaintiff was deceived thereby, and that she had been injured because of them. This instruction was given upon the second trial, which also resulted in a verdict for the plaintiff below, followed by a judgment, from which the defendant below has taken this appeal.

We have made a careful examination of the record of this second trial and have compared it with that of the first trial, and, with the exception of the giving of this instruction, which was refused on the first trial, we can find no substantial difference in the two records. If there be any difference, there is, in the second record, a still stronger preponderance of the evidence in favor of appellee. There is an abundance of evidence from which the jury are warranted in finding that appellant knew the facts concerning the lands in Wisconsin, which he sold or traded to appellee, and that he mis-stated them to appellee, and that she acted

Cum. No. 4148.

John Pain, appellee

vs.

Jesse Carroll from Carroll.

John T. Stowell, Attorney.

Thos. C. C.

This case was before this court at the April Term 1884, and our opinion, reversing and remanding the cause, (Pain v. Carroll, 1884 Ill. App. 368, to which we refer for a statement of the facts.) That opinion reversing and remanding the cause, was based upon the refusal of the court to give instruction No. 17, requested by appellant, which would have made the jury find, before the plaintiff would recover, she must prove by a preponderance of the evidence that misrepresentations relative to the land in question were made by the defendant, that such misrepresentations were false and known by the defendant to be false when made, that the plaintiff was deceived thereby, and that she had been injured because of them. This instruction was given upon the second trial, which also resulted in a verdict for the plaintiff below, followed by a judgment, from which the defendant below has taken this appeal.

We have made a careful examination of the record of this second trial and have compared it with that of the first trial, and, with the exception of the giving of this instruction, which was refused on the first trial, we can find no substantial difference in the two records. If there be any difference, there is, in the second record, a still stronger preponderance of the evidence in favor of appellee. There is an abundance of evidence from which the jury are warranted in finding that appellant knew the facts concerning the lands in Wisconsin, which he sold or traded to appellee, and that he mis-stated them to appellee, and that she acted

on such misstatements, believing them to be true. We consider the-evidence in the present record is sufficient to overcome the contention of appellant that the husband of appellee, in viewing the land, was acting as her agent and that therefore the case should be treated the same as if appellee herself had seen the land. Her husband did view certain lands in the vicinity of the lands in question but the evidence shows that he was mislead as to the location of the lands in question, and that appellant was responsible therefor, and that appellee' husband was a person of little business ability and knew nothing about land. The result of this deal in lands was that appellant traded two ignorant persons out of their equity in their home and obtained from them a mortgage on the lands he deeded to them for considerably more than the value of the land and, if appellant is to prevail, he will have succeeded in acquiring the home of appellee at no expense, other than that of foreclosing the mortgage on the property he sold them. Two juries have found for appellee and there is no doubt but what juries would continue to do so if this case should be sent back for another trial.

The only ground for reversal we found in the previous record has been obviated in this record and we consider that the present judgment should be affirmed. Appellee contends that the refusal of certain instructions in the present trial was proper, for the reason that, having been refused on the former trial and such refusal having been tacitly approved by us, the matter became res adjudicata. We cannot agree with appellee in that contention, but we consider that the refusal of instructions, of which complaint is made by appellant, was proper, for the reason that, while the instructions may have stated correct proposition s of law, they were apt to mislead the jury. We consider that the jury was properly instructed

on such misstatements, believing them to be true.

We consider the evidence in the present record is sufficient to overcome the contention of appellant that the husband of appellee, in viewing the land, was acting as her agent and that therefore the case should be treated the same as if appellee herself had seen the land. Her husband did view certain lands in the vicinity of the lands in question but the evidence shows that he was misled as to the location of the lands in question, and that appellant was responsible therefor, and that appellee' husband was a person of little business ability and knew nothing about land. The result of this deal in lands was that appellant traded two ignorant persons out of their equity in their home and obtained from them a mortgage on the lands he deeded to them for considerably more than the value of the land, if appellant is to prevail, he will have succeeded in acquiring the home of appellee at no expense, other than that of foreclosing the mortgage on the property he sold them. Two juries have found for appellee and there is no doubt but what juries would continue to do so if this case should be sent back for another trial.

The only ground for reversal we found in the previous record has been obviated in this record and we consider that the present judgment should be affirmed. Appellee contends that the refusal of certain instructions in the present trial was error, for the reason that, having been refused on the former trial and such refusal having been tacitly approved by us, the matter became res adjudicata. We cannot agree with appellee in that contention, but we consider that the refusal of instructions, of which complaint is made by appellants, was proper, for the reason that, while the instructions set forth stated correct propositions of law, they were apt to mislead

and that common justice and the weight of the evidence is with appellee.

The judgment is therefore affirmed.

and that common justice and the weight of the evidence is with appellee.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6118.

Charles Elliott, appellee.

vs Appeal from Ogle.

Irvin M. Kidder, appellant.

Dibell, P. J.

Elliott sued Kidder upon four promissory notes, two of which were executed by Kidder and payable to Elliott, and in two of which Elliott was surety for Kidder and was compelled to pay the notes. Kidder pleaded the general issue. There was a jury trial. The amount due by the face of the notes was nearly $7,000 and Elliott had a verdict and a judgment for $3,000 and Kidder appeals.

The validity of the notes and the original liability of Kidder thereon are not disputed. The sole defence interposed is as follows: Kidder claims that he and Elliott were partners in various real estate deals and other transactions, and that Elliott, Kidder and H. W. Leydig were partners in other real estate deals and other transactions. Elliott lived in Iowa; Kidder then lived in Polo, and Leydig at Dixon. Kidder claims that the three met at a hotel in Dixon and had a settlement; that Leydig demanded back a note which he had given and Kidder held for land in Missouri that was not worth the mortgage upon it, and that Kidder surrendered that note to Leydig; that Kidder then offered Elliott 160 acres of land in Nebraska, 37½ acres of land in Dakota, 8,000 shares of the stock of the Patterson Heat & Light Co. at $1.00 per share, 6,500 shares of Montana Oil stock, 2,800 shares of International Mining stock, and some shares of ice, coal and coke plant stock in St Louis; that Elliott consented to surrender the notes here in suit for that consideration, but said he could not then deliver them because he had them in a bank in Iowa as collateral, but that he agreed to surrender them

Cas. No. 6118.

Charles Elliott, Appellee.

vs

Appeal from Ogle.

Irvin M. Kudder, et al.

Dibell, P. J.

Elliott and Kidder were for several years, the of which were executed by Kidder and payable to Elliott, and in two of which Elliott was surety for Kidder and was compelled to pay the notes. Kidder pleaded the general issue. There was a jury trial. The amount due by the face of the notes was nearly $7,000 and Elliott had a verdict and a judgment for $3,000 and Kidder appeals.

The validity of the notes and the original liability of Elliott thereon are not disputed. The sole defence interposed is as follows: Kidder claims that he and Elliott were partners in various real estate deals and other transactions, and that Elliott, Kidder and H. W. Leydig were partners in other real estate deals and other transactions. Elliott lived in Iowa; Kidder then lived in Polo, and Leydig at Dixon. Kidder claims that the three met at a hotel in Dixon and had a settlement; that Leydig demanded back a note which he had given and Kidder held for land in Missouri that was not worth the mortgage upon it, and that Kidder surrendered that note to Leydig; that Kidder then offered Elliott 160 acres of land in Nebraska, 57½ acres of land in Dakota, 8,000 shares of the stock of the Patterson Heat & Light Co. at $1.00 per share, 2,500 shares of Montana Oil stock, 2,500 shares of International Mining stock, and some shares of ice, coal and rock plant stock in Ft Louis, that Elliott consented to surrender the notes here in suit for that consideration, but said he could not then deliver them because he had them in a bank in Iowa as collateral, but that he agreed to surrender them

when his debt to the bank was paid. This alleged settlement, wherein these notes were to be surrendered, was sworn to by Kidder and Leydig . Elliott denied making any such settlement or agreeing to surrender such notes. There was like evidence of a later interview at the Stock Yards in Chicago confirmatory of the alleged settlement, and like evidence contradicting it. It is urged that as two witnesses testified to the settlement and only one against it, the preponderance of the evidence was in favor of the defense and a new trial should be granted. The narrative testified to by the defense bears many elements of improbability. There is no claim but that Elliott's notes were valid and it is not claimed that Kidder was insolvent and these notes therefore were worth nearly $7,000. None of the witnesses had ever seen this Nebraska land, and none of them knew whether it was worth anything or not. It had been traded in for an automobile, but there is no proof whether the machine was old or new, whether it was a Ford or a limousine, nor what it was worth, or that any of the witnesses had ever seen it. Elliott already had the title to that land, and Kidder was not giving him any warranty of title or binding himself in any way. None of the witnesses had ever seen the Dakota land or knew anything about its value. Kidder held a deed for it in which the grantee's name was left blank. The proposal was that he deliver that blank deed to Elliott and let Elliott either write in his own name or trade it off to some one else. Kidder was not to warrant the title or to assume any liability. None of the witnesses knew that the shares of capital stock had any value whatever. Appellant claims that if the evidence of Elliott is read in full in the record it will disclose that he was very uncertain and indefinite about many things. We have reas

when his debt to the bank was paid. This alleged settlement, wherein these notes were to be surrendered, was sworn to by Kidder and Leydig. Elliott denied making any such settlement or agreeing to surrender such notes. There was life evidence of a later interview at the Stock Yards in Chicago contradictory of the alleged settlement, and life evidence contradicting it. It is urged that as two witnesses testified to the settlement and only one spoke against it, the preponderance of the evidence was in favor of the defense and a new trial should be granted. The narrative testified to by the claimant here was clearly lacking in probability. There is no claim but that Elliott's notes were valid and it is not claimed that Kidder was insolvent and these notes therefore were worth nearly $7,000. None of the witnesses had ever seen this Dakota land, and none of them knew whether it was worth anything or not. It had been traded in for an automobile, but there is no proof whether the machine was old or new, whether it was a Ford or a Limousine, nor what it was worth, or that any of the witnesses had ever seen it. Elliott already had the title to that land, and Kidder was not giving him any warranty of title or binding himself in any way. None of the witnesses had ever seen the Dakota land or knew anything about its value. Kidder held a deed for it in which the grantee's name was left blank. The proposal was that he neither that blank land to Elliott and let Elliott either write in his own name or trade it off to some one else. Kidder was not to warrant the title or to assume any liability. None of the witnesses here that the alleged [illegible] had any value whatever. Appellant claims that if the evidence of Elliott is read in full in the record it will disclose that he was very uncertain and indefinite about many things. We have read

from the record all of the evidence of Kidder, Leydig and Elliott, and the criticism applies to all three. None of them knew practically anything about the property which Kidder and Leydig claim Elliott agreed to take in satisfaction of nearly $7,000 of good notes. The testimony of Kidder and Elliott makes it plain that they considered those properties mere "cats and dogs" and having no known value except to trade with some one. If Elliott was competent to transact business affairs, it is very improbable that he made any such sacrifice of these notes. The jury also saw these three men on the witness stand. The jury were to some extent influenced by the testimony of Kidder and Leydig, for they allowed plaintiff less than one half of the amount due on the face of his notes. We are of opinion we cannot disturb this verdict on the evidence, approved as it is by the trial judge.

It is argued that the court erred in giving appellee's fourth instruction. It relates to the treatment to be accorded the testimony of witnesses who have knowingly testified untruthfully and are not corroborated, and it omits the element that such untruthful testimony must relate to a matter material to the issue. This omission was a fatal defect. Such an error does not necessarily reverse, as shown by Chicago City Ry. Co. v Ryan, 235 Ill. 287, relied upon by appellant. This instruction is not positive, nor directory. It only tells the jury that the testimony of one credible witness may be entitled to more weight than the testimony of many others if, etc. The preceding instruction, No. 3 had stated the law exactly and accurately on this subject and had included the principle that the false testimony must be in relation to a matter or thing material to the issue. We do not find in this case any contradiction in testimony, except upon matters material to the issue. We conclude appellant was

From the record all of the evidence of Ridder, Leydig and Elliott, and the evidence is clear to all three. None of them gave practically anything about the property which Ridder and Leydig claim Elliott agreed to take in satisfaction of nearly $7,000 of good notes. The testimony of Ridder and Elliott makes it plain that they considered those properties were "worse than dogs" and having no known value, except to trade with some one. If Elliott was competent to transact business affairs, it is very improbable that he made any such sacrifice of these notes. The jury also saw these three men on the witness stand. The jury were to some extent influenced by the testimony of Ridder and Leydig, for they allowed plaintiff less than one half of the amount due on the face of the notes. We are of opinion we cannot disturb this verdict on the evidence, approved as it is by the trial judge.

It is argued that the court erred in giving appellee's fourth instruction. It relates to the treatment to be accorded the testimony of witnesses who have knowingly testified untruthfully and are not corroborated, and it omits the element that such untruthful testimony must relate to a matter material to the issue. This omission was a fatal defect. Such an error does not necessarily reverse, as shown by Chicago City Ry. Co. v Ryan, 225 Ill. 287, relied upon by appellant. This instruction is not peculiar, nor misleading. It only tells the jury that the testimony of one credible witness may be entitled to more weight than the testimony of many others if, etc. The preceding instruction, No. 3, had stated the law exactly and accurately on this subject and had included the principle that the false testimony must be in relation to a matter or thing material to the issue. We do not find in this case any contradiction in testimony, except upon matters material to the issue. We conclude appellant was

not harmed by this instruction. The court gave instruction No. 1, requested by defendant, and refused Nos. 2 and 3 as offered, and modified them and gave them as Nos. 4 and 5 and refused instructions Nos. 6 and 7. We are of opinion that Nos. 4 and 5 gave a full statement of the law as applicable to the case sought to be established by appellant, and that the court did not err in modifying Nos. 2 and 3, and that Nos. 6 and 7 were but a repetition of that which was given.

Upon the whole record, we are of opinion that appellant at least has nothing of which to complain in the verdict and the judgment.

The judgment is therefore affirmed.

not barred by this limitation. The court goes interpreting Nos. 2, requested by defendant, and refuses Nos. 3 and 4 as offered, and modifies [illegible] as to Nos. 1 and 2 and refuses instructions Nos. 6 and 7. We are of opinion that Nos. 4 and 5 give a full statement of the law as applicable to the case sought to be established by appellant, and that the court did err in modifying Nos. 2 and 3, and that Nos. 6 and 7 were not a correction of law given.

It is upon the whole record, as we of opinion that appellant at least has nothing of which to complain in the verdict and the judgment.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6135.

Harley Baitty, appellee.

vs Appeal from Peoria.

Toledo, Peoria & Western

Railway Company, appellant.

Dibell, P. J.

On the evening of the 30th. day of September A. D. 1913, Harley Baitty attempted to board a train of the Toledo Peoria & Western Railway Company in the City of Peoria, and was run over and so badly injured as to necessitate the amputation of both legs. He brought suit against the railroad company to recover damages for said injuries, and on a second trial, the first jury having disagreed, recovered a verdict and a judgment for $35,000 from which the defendant below has appealed to this court. The declaration consisted of twelve counts, of which the third, seventh, ninth, tenth eleventh and twelfth were withdrawn from the consideration of the jury by the court upon the trial. The other counts of the declaration alleged, in various ways, that appellee was in the act of boarding the train with the intention of becoming a passenger thereon and was in the exercise of due care for his own safety; that appellant then and there started said train without warning appellee of its intention so to do, after appellee had been invited by the servants of appellant to board said train at that place and time; and that because of such wrongful conduct on the part of appellant, appellee was injured. The declaration also alleged in each of said counts that appellant had long been in the habit of stopping its passenger trains at a point between the Union Depot and the Illinois River bridge in the City of Peoria; that for a long time prior thereto it had been the practice and custom for

Sup. Ct. Ill.

Harley Baitty, appellee.

vs. Appeal from Peoria.

Toledo, Peoria & Western

Railway Company, appellant.

Mr. Justice T. E.

On the evening of the 30th day of September A. D. 1911, Harley Baitty attempted to board a train of the Toledo Peoria & Western Railway Company in the City of Peoria, and was run over and so badly injured as to necessitate the amputation of both legs. He brought suit against the railroad company to recover damages for said injuries, and on a second trial, the first jury having disagreed, recovered a verdict and a judgment for $25,000 from which the defendant below has appealed to this court. The declaration consisted of twelve counts, of which the third, seventh, ninth, tenth, eleventh and twelfth were withdrawn from the consideration of the jury by the court upon the trial. The other counts of the declaration alleged, in various ways, that appellee was in the act of boarding the train with the intention of becoming a passenger thereon and was in the exercise of due care for his own safety; that appellant then and there started said train without warning appellee of its intention so to do, after appellee had been invited by the servants of appellant to board said train at that place and time; and that because of such wrongful conduct on the part of appellant, appellee was injured. The declaration also alleged in each of said counts that appellant had long been in the habit of stopping its passenger trains at a point between the Union Depot and the Illinois River bridge in the City of Peoria; that for a long time prior thereto it had been the practice and custom for

large numbers of persons to board the passenger trains of appellant at such point; and that appellant knew of and sanctioned such custom, and had permitted and invited intending passengers to board its trains in that manner.

The passenger trains of appellant, leaving the Union Depot in Peoria on their east-bound run, cross Channel Street immediately after emerging from the train shed and then proceed in a northeasterly direction across certain tracks of the Rock Island Railroad and the bridge over the Illinois River, and thence East. It is the contention of appellee that appellant's train No. 2, on the night in question, came to a full stop just after leaving the depot, so that the first passenger coach, known as the smoking car, rested on Chestnut street; that appellee approached this motionless train for the purpose of boarding it, having a ticket in his pocket entitling him to passage from Peoria to Washington Illinois, took hold of the hand rails with both hands and was about to place his foot on the lowest step. when the train started without any warning and with a great jerk; that he had been invited to board this train at this point by a man in uniform, standing on the platform of the car, whom he understood to be one of the servants of appellant; and that the jerk with which the train was started caused him to lose his hold on the car and he was ~~xxx~~ thrown under the wheels and injured. It is the contention of appellant that the great preponderance of the evidence shows that this train did not stop at Chestnut Street that night at all; that appellee attempted to get on the train while it was in motion and was injured thereby; that no employee of the company invited him to get on; that appellee was intoxicated when he tried to get on the train; and that appellant had no custom of stopping its passenger trains at Chestnut

large numbers of persons to board the passenger trains of appellant at such point; and that appellant knew of and acquiesced in such custom, and had permitted and invited intending passengers to board its trains in that manner.

The passenger trains of appellant, leaving the Union Depot in Peoria on their east-bound run, cross Charnel Street immediately after emerging from the train shed and then proceed a northeasterly direction across certain tracks of the Rock Island Railroad and the bridge over the Illinois River, and thence east. It is the contention of appellee that appellant's train No. 8, on the night in question, came to a full stop that after leaving the depot, so that the flat platform on the east side of the coach, known as the smoking car, ran alongside of Chestnut street; that appellee approached the motionless train for the purpose of boarding it, having a ticket in his pocket entitling him to passage from Peoria to Washington Illinois, took hold of the hand rails with both hands and was about to place his foot on the lowest step, when the train started without any warning and with a great jerk; that he had been invited to board this train at this point by a man in uniform, standing on the platform of the car, who he understood to be one of the servants of appellant; and that the jerk with which the train was started caused him to lose his hold on the car and he was thrown under the wheels and injured. It is the contention of appellant that the great preponderance of the evidence shows that this train did not stop at Chestnut Street that night or that appellee attempted to get on the train while it was in motion and was injured thereby; that no employee of the company invited him to get on; that appellee was intoxicated when he attempted to get on the train; and that appellant no knowledge of intoxicated condition; that appellee

Street and inviting and permitting passengers to board its trains there, but that it was occasionally obliged to stop its trains so that a part thereof rested on Chestnut Street, because its crossing of another railroad ahead was blocked by other trains.

After an exhaustive examination of the record itself, we conclude that the verdict of the jury and the judgment of the court are against the clear preponderance of the evidence, and that the cause ought to be submitted to another jury. We have examined the record very carefully upon the various questions presented, and find none on which the preponderance of the evidence favors appellee. Two witnesses testified for appellee that the train was at a standstill when he tried to get on, one of these witnesses being appellee himself. Four witnesses testified for appellant that the trail was in motion when appellee was trying to board it and of these witnesses two were not railroad men, while the other two were not employed by appellant but by another railroad company at Peoria. On the question whether or not train No. 2 stopped at Chestnut Street the night in question before appellee attempted to get on, two witnesses, one being appellee himself, testified that the train did so stop, while at least nineteen witnesses testified that the train did not stop at all after leaving the Union Depot until after the rear of the last coach was north of Chestnut Street a considerable distance. It is true that someof these witnesses were railroad men, working for appellant, but at least ten of them witnesses on this point had no connection with appellant or any other railroad company and were entirely disinterested, so far as we can judge from the record.

On the question whether or not an employee of appellant invited appellee to board the train at Chestnut there was little

Street and inviting and permitting passengers to board its trains there, but that it was occasionally obliged to stop the trains so that a part thereof rested on Chestnut Street, because its crossing of another railroad ahead was blocked by other trains.

After an exhaustive examination of the record itself, we conclude that the verdict of the jury and the judgment of the court are against the clear preponderance of the evidence, and that the cause ought to be submitted to another jury. We have examined the record very carefully upon the various questions presented, and find none on which the preponderance of the evidence favors appellee. Two witnesses testified for appellee that the train was at a standstill when he tried to get on, one of these witnesses being appellee himself. Four witnesses testified for appellant that the train was in motion when appellee was trying to board it and of these witnesses two were not railroad men, while the other two were not employed by appellant but by another railroad company at Peoria. On the question whether or not train No. 8 stopped at Chestnut Street the night in question while appellee attempted to get on, two witnesses, one being appellee himself, testified that the train did so stop, while at least nineteen witnesses testified that the train did not stop at all after leaving the Union Depot until after the time of the last event was north of Chestnut Street a considerable distance. It is true that some of these witnesses were railroad men, working for appellant, but at least ten of these witnesses on this point had no connection with appellant or any other railroad company and were entirely disinterested, so far as we can judge from the record.

On the question whether or not an employee of appellant invited appellee to board the train at Chestnut there was little

evidence introduced for either side. Appellee testified that, as he went along the street towards the train, a man on the platform, who appeared to be dressed in a blue uniform, called out to him to "Hurry up," but appellee afterwards failed to identify eakher the conductor or the brakeman on duty on that train that night as being the person who had made that remark to him, while the conductor and the brakeman, the only uniformed servants of appellant on that train that night, denied that they had seen appellee before he was run over or that they had urged or invited him to board the train.

Appellee and four others testified that he was not intoxicated the evening of the accident, while sixteen witnesses testified for appellant to circumstances which make it apparent that appellee was under the influence of liquor when he attempted to board the train. Three doctors and two nurses testified to the odor of liquor on the breath of appellee after the accident and to the fact that the amount of anesthetic required in his case before operating upon him immediately after the accident was less than usual because of his being under the influence of liquor. In rebuttal, one of appellee's witnesses testified that while appellee lay on the ground, just after being injured, some one produced a bottle of whiskey and gave a part of its contents to appellee. This witness was the only one who testified to this occurrence and he was unable to identify the person who produced the liquor. Others present at the same time denied that any such thing happened.

Fifteen witnesses testified for appellee that this particular train was in the habit of stopping with one or more of its coaches on Chestnut Street and that passengers frequently boarded it at that point, and while the train was at a standstill. Twenty eight persons testified for appellant that there was no established custom on the part of the

witnesses introduced for either side. Appellee testified that, as he was going, his friend Dennis Dunn, a non-resident practitioner, who appeared to be dressed in a blue uniform, called out to him to "Hurry up," but appellee afterwards failed to identify neither the conductor or the brakeman on duty on that train that night as being the person who had made that remark to him, while the conductor and the brakeman, the only uniformed servants of appellant on that train that night, denied that they had seen appellee before he was on over or that they had urged or invited him to board the train.

Appellee and four others testified that he was not intoxicated the evening of the accident, while sixteen witnesses testified for appellant to circumstances which make it apparent that appellee was under the influence of liquor when he attempted to board the train. Three doctors and two nurses testified to the odor of liquor on the breath of appellee after the accident and to the fact that the amount of anesthetic required in his case before operating upon his injuries after the accident was less than usual because of his being under the influence of liquor. In rebuttal, one of appellee's witnesses testified that while appellee lay on the ground, just after being injured, some one produced a bottle of whiskey and gave a part of its contents to appellee. This witness was the only one who testified to this occurrence and he was unable to identify the person who produced the liquor. Others present at the same time denied that any such thing happened.

Fifteen witnesses testified for appellee that this particular train was in the habit of stopping with one or more of its coaches on Chestnut Street and that passengers frequently boarded it at that point, and while the train was at a standstill. Twenty eight witnesses testified for appellant that there was no established custom on their part of the

servants of appellant operating this train to bring it to a stop at Chestnut Street, and many of these witnesses stated that such persons as occasionally boarded this train at Chestnut Street, did so while the train was moving slowly across the street. It is true that some of appellant's witnesses on this point were railroad men and possibly not disinterested, but many of them were without any apparent interest whatsoever.

A careful examination of the evidence in the record leads us to the conclusion that the clear preponderance of the evidence shows that appellee was under the influence of liquor and that he attempted to board the train while it was in motion; that he was not in the exercise of due care for his own safety and that there was no negligence on the part of appellant contributing to the accident.
We believe the case should be submitted to another jury.
The judgment is therefore reversed and the cause remanded.

servants of appellant operating this train to bring it to a stop at Chestnut Street, and many of these witnesses stated that such persons as occasionally boarded this train at Chestnut Street, did so while the train was moving slowly across the street. It is true that some of appellant's witnesses on this point were railroad men and possibly not disinterested, but many of them were without any apparent interest whatever whatsoever.

A careful examination of the evidence in the record leads us to the conclusion that a the clear preponderance of the evidence shows that appellee was under the influence of liquor and that he attempted to board the train while it was in motion; that he was not in the exercise of due care for his own safety and that there was no negligence on the part of appellant contributing to the accident.

We believe the case should be submitted to another jury.

The judgment is therefore reversed and the cause remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6069

Henry Mullen, Deft. in error

vs Error to Lake.

W. O. Johnson, Receiver &c.

Plaintiff in error.

Carnes, J.

On the 5th. day of August 1912, Henry Mullen defendant in error, hereinafter called the plaintiff, was driving a covered wagon with a load of cut flowers on a public highway from the city of Lake Forest, Illinois, north to the City of Waukegan, and while crossing the double tracks of the Chicago & Milwaukee Electric Railroad Company, of which company W. O. Johnson, the plaintiff in error, was receiver, the hind wheel of his wagon was struck by a car running north on the east track and he claims to have been injured by the shock of the collision. He brought this action to recover for that injury and filed a declaration of one count charging in general terms negligence of the defendant in careless and improper management of the car. A plea of the general issue was filed and the case proceeded to a jury trial. At the close of the evidence the defendant moved for an uninstructed verdict, and on motion of the plaintiff a juror was withdrawn and the case continued. Thereafter the plaintiff filed an additional count charging wilful, wanton and malicious injury. The plea of general issue was ordered to stand to the additional count also, and a second jury trial followed. The court submitted to the jury three forms of verdict, one as to the original count, one as to the additional count, and a third finding the defendant not guilty. The jury found the defendant guilty under the first count, and assessed plaintiff's damages at $1,500.00 but found the defendant not guilty under the additional count. The court, after overruling motions by the

Gen. No. 9049

Henry Mullen, Defd. in error

vs Error to Lake.

W. O. Johnson, Receiver &c.

Plaintiff in error.

Carnes, J.

On the 8th. day of August 1912, Henry Mullen defendant in error, hereinafter called the plaintiff, was driving a covered wagon with a load of cut flowers on a public highway from the city of Lake Forest, Illinois, north to the City of Waukegan, and while crossing the double tracks of the Chicago & Milwaukee Electric Railroad Company, of which company W. O. Johnson, the plaintiff in error, was receiver, the hind wheel of his wagon was struck by a car running north on the east track and he claims to have been injured by the shock of the collision. He brought this action to recover for that injury and filed a declaration of one count charging in general terms negligence of the defendant in carelessness and improper management of the car. A plea of the general issue was filed and the case proceeded to a jury trial. At the close of the evidence the defendant moved for an uninstructed verdict, and on motion of the plaintiff a juror was withdrawn and the case continued. Thereafter the plaintiff filed an additional count charging wilful, wanton and malicious injury. The plea of general issue was ordered to stand to the additional count also, and a second jury trial followed. The court submitted to the jury three forms of verdict, one as to the original count, one as to the additional count, and a third finding the defendant not guilty. The jury found the defendant guilty under the first count, and assessed plaintiff's damages at $1,500.00. But found the defendant not guilty under the additional count. The court, after overruling motions by the

defendant for a new trial and in arrest of judgment, entered judgment on the verdict for $1,500.00 and the case is brought here by the defendant by writ of error.

The plaintiff was a man about 45 years old, in the employ of a florist and had been over this highway many times and was familiar with the location and operation of cars there. He had been driving north om a highway that ran a little distance away from the electric railroad, perhaps 45 feet. At a point not far from where the accidenthappened the car tracks came on to the public street at a place where it deflects slightly to the east. It was natural and usual for drivers of vehicles to cross the car tracks to get on the east side of them at about this point where the road deflects, and there was a portion of the road worn by travel indicating where teams had often crossed. The evidence is conflicting whether plaintiff crossed at the beaten path or drove along the west track for some distance and then abruptly turned and crossed the east track ahead of the approaching car. If he was crossing at the usual place there is some ground for the contention that the motorman was neglogent in not, after observing him, having his car in control sufficiently to prevent the accident. The view was unobstructed for several hundred feet from the place of the accident. If, on the other hand, plaintiff was driving on a parallel track and suddenly turned in front of the approaching car there is little, if any ground for holding the defendant negligent in not ~~xxxxxxxing~~ anticipating the plaintiff's action. The same considerations are important on the question whether the plaintiff was at the time in the exercise of due care. There are many cases holding the obvious fact that the driver of a vehicle who drives along parallel to a street car track in a public highway

defendant for a new trial and in arrest of judgment, entered judgment on the verdict for $1,500.00 and the case is brought here by the defendant by writ of error.

The plaintiff was a man about 45 years old, in the employ of a florist and had been over this highway many times and was familiar with the location and surroundings at this place. He had been driving north on a highway that ran a little distance away from the electric railroad, perhaps 45 feet. At a point not far from where the accident happened the car tracks came on to the public street at a place where it deflects slightly to the east. It was natural and usual for drivers of vehicles to cross the car tracks to get on the east side of them at about this point where the road deflects, and there was a portion of the road worn by travel indicating where these had often crossed. The evidence is conflicting, namely plaintiff crossed at the beaten path or drove along the east track for some distance and then abruptly turned and crossed the east track ahead of the approaching car. If he was crossing at the usual place there is some ground for the contention that the motorman was negligent in not, after observing him, having his car in control sufficiently to prevent the accident. The view was unobstructed for several hundred feet from the place of the accident. If, on the other hand, plaintiff was driving on a parallel track and suddenly turned in front of the approaching car there is little, if any ground for holding the defendant negligent in not anticipating the plaintiff's action. The same considerations are important on the question whether the plaintiff was at the time in the exercise of due care. There is only some holding the obvious fact that the driver of a vehicle who drives along parallel to a street car track in a public highway

and suddenly turns upon that track without looking to see if a car is approaching is not in the exercise of ordinary care and is guilty of contributory negligence, and it is not true as plaintiff's counsel seem to assume in their argument that the driver of a vehicle has the right to drive on a street car track and rely on the motorman stopping his car to avoid a collision. The court said in the case of The Chicago Union Traction Company v Jacobson, 217 Ill. 404 on page 408:- "The law does not permit one in such a place to drive in the path of amoving car, relying on those in charge of the car to stop it and protect him from injury." Drivers of vehicles have not equal rights in the highway with a street car company to the extent that they may drive across street car tracks between street intersections knowing that a collision will be inevitable unless the car is stopped. ibid.

The case at bar is, in many respects, like that of Hank v Peopia Railway Company, 154 Ill. App. 475 and but for the question whether the plaintiff was crossing the defendants tracks at a usual place of crossing we would conclude, as we did in that case, that there is nox right of recovery. It will readily occur to any one that he should and ordinarily does, take more precaution in crossing streets on which there is much traffic or on which there are car tracks, at places not customarily so used than at places that are habitually so used, and it is equally clear that a street car should be operated with more care at places habitually used for crossing by the public. The courts recognize this distinction (The Chicago City Railway Company v Tuoht, 196 Ill 410)It is true plaintiff was not crossing defendant's tracks at the intersection of streets as in most cases where the above rule is applied, but if the motorman saw him driving

and suddenly turns upon that track without looking to see if a car is approaching is not in the exercise of ordinary care and is guilty of contributory negligence, and it is not true as plaintiff's counsel seem to assume in their argument that the driver of a vehicle has the right to drive on a street car track and rely on the motorman stopping his car to avoid a collision. The court said in the case of The Chicago Union Traction Company v Jacobson, 217 Ill. 404 on page 408:- "The law does not permit one in such a place to drive in the path of moving car, relying on those in charge of the car to stop it and protect him from injury." Drivers of vehicles have not equal rights in the highway with a street car company to the extent that they may drive across street car tracks wherever street intersections knowing that a collision will be inevitable unless the car is stopped. Ibid.

The case at bar is, in many respects, like that of Hunk v People Railway Company, 154 Ill. App. 475 and but for the question whether the plaintiff was crossing the defendants tracks at a usual place of crossing we would conclude, as we did in that case, that there is no right of recovery. It will readily occur to any one that he should and ordinarily does, take more precaution in crossing streets on which there is much traffic or on which there are car tracks, at places not customarily so used than at places that are habitually so used, and it is equally clear that a street car should be operated with more care at places habitually used for crossing by the public. The courts recognize this distinction (The Chicago City Railway Company v Tuohy, 188 Ill 420)If is true plaintiff was not crossing defendant's tracks at the intersection of streets as in most cases where the above rule is applied, but if the motorman saw him driving

along the track without crossing at the usual place he might well assume he did not intend to cross and not hold his car under so good control as if he saw him approaching the usual place where vehicles passed over the tracks.

The evidence on the question whether the plaintiff was crossing the tracks on the street or highway on the beaten path, and consequently at the usual place of crossing, where the motorman would be presumed to know that there might be vehicles crossing and therefore be held to better control of his car if he saw an approaching vehicle, is not only contradictory but is much of it vague and unsatisfactory. It seems to us it tends more strongly to prove that the plaintiff was not crossing at the beaten track but was driving along on the parallel railway track much farther than would have been the case had he crossed the tracks at the usual place; but the record is not clear enough in this respect so that we feel authorized to follow the course takenin Hank v Peoria Railway Company, supra, and reverse the cause without remanding.

There is conflict in the evidence as to the speed at which the car was running and to whether or not signals were given. The accident did not happen at a street intersection and therefore there was no occasion for signals except insofar as might be deemed necessary in the exercise of care by the motorman to give warning of the approach of his car when he sees a vehicle ahead of him that might, in the absence of warning, turn upon his track. If it was at a place where the motorman should know that vehicles generally crossed his track there would be much more necessity for signals than if the vehicle was proceeding on a parallel track with no presumption that it would turn across ahead of the car. There is no evidence to sppport a verdict of wilful and

along the track without crossing at the usual place he might well assume he did not intend to cross and not hold his car under as good control as if he was approaching the usual place where vehicles passed over the tracks.

The evidence on the question whether the plaintiff was crossing the tracks on the street or highway on the beaten path, and consequently at the usual place of crossing, where the motorman would be presumed to know that there might be vehicles crossing and therefore be held to better control of his car if he saw an approaching vehicle, is not only contradictory but is much of it vague and unsatisfactory. It seems to us it tends more strongly to prove that the plaintiff was not crossing at the beaten track but was driving along on the parallel railway track [illegible] been the case had he crossed the tracks at the usual place; but the record is not clear enough in this respect so that we feel authorized to follow the course taken in Hank v Peoria Railway Company, supra, and reverse the cause without remanding.

There is conflict in the evidence as to the speed at which the car was running, and to whether or not signals were given. The accident did not happen at a street intersection and therefore there was no occasion for signals except insofar as they may be deemed necessary in the exercise of care by the motorman to give warning of the approach of his car when he sees a vehicle ahead of him that might, in the absence of warning, turn upon his track. If it was at a place where the motorman should know that vehicles generally crossed his track there would be much more necessity for signals than if the vehicle was proceeding on a parallel track with no presumption that it would cross ahead of the car.

There is no evidence to support a verdict of wilful and

wanton conduct in running the car at a high rate of speed. The verdict of the jury finding the defendant not guilty on the second count was right. And even if the defendant was guilty of negligence contributing to the collision andinjury, the law does not permit a recovery if the plaintiff was negligent in failing to employ all reasonable means to avoid the collision.

We are not satisfied from a reading of the record that the plaintiff received a serious injury. He was not thrown from the wagon. The wagon was not injured except to break one or two spokes of the rear wheel. The car stopped within three feet after it struck the wagon. Plaintiff was able thereafter to pursue his business driving a florist's wagon and lost no time. He was not examined by a physician until more than two weeks after the accident and then there was no external evidences of violence or bruises. He claimed to have been thrown back in the wagon and to have lost control of his head and neck muscles; that he could not hold up his head a few minutes afterwards, and had a pain in the head and in the region of the heart, and dizziness. When examined the doctorx found some tenderness on the right side over the region of the right kidney and found his heart irregular and intermittent, which he testified was due to a nervous condition, and that there was no functional disorder. The physician was only able to testify from what the plaintiff told him and the condition of the heart, and said there was a possibility that the condition might have existed for years before. That it might have existed therstofore without the plaintiff knowing it, though probably not. The evidence as to the injury rests entirely upon the testimony of the plaintiff and this physician. The plaintiff said he never suffered any of these symptoms before the accident. It does not appear that

system conduct in running the car at a high rate of speed. The verdict of the jury finding the defendant guilty on the second count was right. And even if the defendant was guilty of negligence contributing to the collision complained, the law does not invest a passenger if the chauffeur was negligent in failing to employ all reasonable means to avoid the collision.

We are not satisfied from a reading of the record that the plaintiff received a serious injury. He was not thrown from the wagon. The wagon was not injured except to break one or two spokes of the rear wheel. The car stopped within three feet after it struck the wagon. Plaintiff was able thereafter to pursue his business driving a florist's wagon and lost no time. He was not examined by a physician until more than two weeks after the accident and then there was no external evidence of violence or bruises. He claimed to have been thrown back in the wagon and to have lost control of his head and neck muscles; that he could not hold up his head a few minutes afterwards, and had a pain in the head and in the region of the heart, and dizziness. When examined the doctors found some tenderness on the right side over the region of the right kidney and found his heart irregular and intermittent, which he testified was due to a nervous condition, and that there was no functional disorder. The physician was only able to testify from what the plaintiff told him and the condition of the heart, and said there was a possibility that the symptoms might have existed for years before. That it might have related Waterloo--though the plaintiff knowing it, though probably not. The evidence as to his injury rests largely upon the testimony of the plaintiff and this physician. The plaintiff said he never suffered by of these symptoms before the accident. It does not appear that

he claimed to have been injured or hurt in any way at the time of the accident when the car stopped, and there were several persons present as he got out of the wagon. He may have received a shock from the jar of the collision, and may have suffered substantial injury therefrom, but if so it would seem some evidence of that fact might have been produced by the testimony of parties other than the plaintiff himself, and his physician ~~xxxxxxxx~~ testifying mainly from the plaintiff's own declarations. We do not hold, however, that the evidence does not warrant a finding of substantial injury. But we are of the opinion that the finding of due care by the plaintiff and negligence of the defendant is not sustained by the evidence, and that there should be an opportunity given for further investigation . No error in admission or rejection of evidence or in giving or refusing instructions is suggested in the brief of plaintiff in error.

The judgment is reversed and the cause remanded to the Circuit Court for further proceedings.

Reversed and Remanded.

be claimed to have been injured or hurt in any way at the time of the accident when the car ran out, and there were several persons present as he got out of the wagon. He may have received a shock from the jar of the collision, and may have suffered substantial injury therefrom, but if so it would seem some evidence of that fact might have been produced by the testimony of parties other than the plaintiff himself. and his physician testified testifying relying from the plaintiff's own declarations. We do not hold, however, that the evidence does not warrant a finding of substantial injury. But we are of the opinion that the finding of the jury by the plaintiff and negligence of the defendant is not sustained by the evidence, and that there should be an opportunity given for further investigation. No error in admission or rejection of evidence or in giving or refusing instructions is suggested in the brief of plaintiff in error.

The judgment is reversed and the cause remanded to the Circuit Court for further proceedings.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6079

Ralph Butler, appellee

vs Appeal from Co. Ct. Henderson.

David A. Whiteman, appellant.

Carnes, J.

Appellee, Ralph Butler, sued David A. Whiteman, the appellant, in a justice court on a claim for furnace pipes, registers, etc., furnished by appellee to appellant. Whiteman did not defend before the justice, but appealed to the county court from a judgment for the full amount of the claim. In the county court there was a jury trial, and the judgment for the amount claimed, from which judgment this appeal is prosecuted, and a reversal asked solely on the ground that the verdict is not sustained by a preponderance of the evidence.

Appellee insists, with some reason, that the abstract does not sufficiently show the judgment to entitle the appellant to a consideration of his case by this court; but we have read the evidence and will decide the case on its merits.

It appears that appellant's house had been destroyed by fire, and he required a job of plumbing, and heating pipes and registers for the new house that he was constructing but supposed his old furnace would serve his purpose. He sent appellee specifications that had been prepared for plumbing and heating, and afterwards there was a conference between the parties having these specifications before them, and appellee prepared, signed and handed to appellant a paper writing in which he proposed to do the plumbing work described in detail, and differing somewhat from the description in the specifications, for $310.00 one-half payable on arrival of material, and one-half when the job should be completed.

Cum. No. 4576

Ralph Butler, Appellee

vs. Appeal from St. Cl. Tuskaw.

David A. Whiteman, Appellant.

Carnes, J.

Appellee, Ralph Butler, sued David A. Whiteman, the appellant, in a justice court on a claim for furnace pipe, registers, etc., furnished by appellee to appellant. Whiteman did not defend before the justice, but appealed to the county court from a judgment for the full amount of the claim. In the county court there was a jury trial, and the judgment for the amount claimed, from which judgment this appeal is prosecuted, and a reversal asked solely on the ground that the verdict is not sustained by a preponderance of the evidence.

Appellee insists, with some reason, that the abstract does not sufficiently show the judgment to entitle the appellant to a consideration of his case by this court; but we have read the evidence and will decide the case on its merits.

It appears that appellant's house had been destroyed by fire, and he required a job of plumbing, and heating pipes and such registers for the new house that he was constructing but supposed his old furnace would serve his purpose. He sent appellee specifications that had been prepared for plumbing and heating, and afterwards there was a conference between the parties having these specifications before them, and appellee prepared, signed and handed to appellant a paper writing in which he promised to do the plumbing and heating in detail, and differing somewhat from the description in the specifications, for $210.00 one-half payable on arrival of material, and one-half when the job should be completed.

Appellant afterwards concluded the old furnace would not serve his purpose and bargained with appellee for a new furnacx at an agreed price of $64.50. Appellee proceeded with the work, including putting in of the furnace pipes, registers, etc. which is spoken of as the furnace job, and during the progress of th e work sent appellant a statement, or bill, as follows:

" ½ Plumbing and lighting job $310.	$155.00
" ½ Furnace job,	62.50
" 1 Furnace	64.50
	"$281.50"

which appellant answered, enclosing his check, as follows: "I amenclosing check for $219.50 which is half your bill of $310.00 and full pay for new furnace. "

The dispute is on the question whether the $310.00 proposal included the furnace work. The written proposition did not include that work, but appellant claims and testifies that the only purpose of the writing was to indicate changes from the specifications in doing the plumbing work; that when the paper was handed to him he objected that it did not include the furnace work, and appellee said something to the effect that that was all right and was to be considered as included in his bid, and in this appellant is corroborated by his two daughters who came into the room during the conversation and testified to statements indicating thatthe offer was to include the furnace work in the bid of $310.00.

Appellee testified that it was not agreed in this interview that he should do the furnace work, but that he afterwards met appellant and contracted with him to do it for $135.00. Appellant admits the later meeting at the place mentioned by appellee, but denies that anything was there said about the furnace work. Therefore the jury had for

Appellant afterwards concluded the old furnace would not serve his purpose and bargained with appellee for a new furnace at an agreed price of $[illegible].00. Appellee proceeded with the work, including putting in of the furnace pipes, fixtures, etc. which is spoken of as the furnace job, and during the progress of the work sent appellant a statement, or bill, as follows:

" 1 Plumbing and lighting job. $[illegible].00
" 1 Furnace job. 00.00
T.A.Furnace [illegible]
$[illegible].00"

Upon appellant answered, enclosing his check, as follows:
"I enclosing check for $[illegible].00 which is half your bill of $310.00 and trial pay for new furnace. "

The dispute is on the question whether the $310.00 proposal included the furnace work. The written proposition did not include that work, but appellant claims and testifies that the only purpose of the writing was to indicate changes from the specifications in doing the plumbing work; that when the paper was handed to him he objected that it did not include the furnace work, and appellee said something to the effect that that was all right and was to be considered as included in his bid, and in this appellant is corroborated by his foreman, who was also the man doing the negotiation and testified to statements indicating that the offer was to include the furnace work in the bid of $310.00.

Appellee testified that it was not agreed in this interview that he should do the furnace work, but that a furnace work met appellant and contracted with him to do it for $125.00. Appellant admits the later meeting at the place mentioned by appellee, but denies that anything was said about the 2 furnace work. Therefore the jury had for

consideration the testimony of appellee, corroborated by the written statement of what he proposed to do for $310.00 which it is admitted he made and handed to appellant, in support of appellee's claim, contradicted by appellant, supported in part by the testimony of his two daughters. They believed appellee and found a verdict accordingly.

Appellants counsel have with much industry, collected and cited cases in support of their proposition that - Where the Appellate Court from a careful examination of all the testimony is convinced that the verdict is clearly and manifestly against the weight of the evidence it will set aside such verdict and reverse the judgment. This is no doubt the law, but in stating it and arguing for it the words "clearly and manifestly" must not be overlooked. It is not the duty of this court to set aside verdicts and reverse judgments merely because from a reading of the record it seems to us that the verdict is not supported by the evidence, and it is not true that the preponderance of the evidence on any controverted fact can be determined by counting the witnesses that testified on the one side and the other. It is true that the number of witnesses testifying for or against a given statement of fact is important and to be considered, and obviously true, as has been stated in substance by the courts in cases cited by appellant, that where no reason appears for discrediting witnesses there is no preponderance of evidence when one witness testifies to a fact and another denies it; but that reasons, not apparent to the reviewing court, may exist and be apparent to the jury and the trial court who heard them testify is a common sense proposition that has been again and again recognized by the courts. From a careful examination of the record we cannot say that the verdict is clearly and

contradiction. The testimony of appellee, corroborated by the written statement of what he proposed to do for $310.00 which it is admitted he was and needed it himself, is supported by appellee's claim, contradicted by appellant, supported in part by the testimony of his two daughters. They believed appellee and found a verdict accordingly.

Appellants counsel have with much industry, collected and cited cases in support of their proposition that - where the Appellate Court from a careful examination of all the testimony is convinced that the verdict is clearly and manifestly against the weight of the evidence it will set aside such verdict and reverse the judgment. There is no doubt the law, but in stating it and arguing for it the words "clearly and manifestly" must not be overlooked. It is not the duty of this court to set aside verdicts and reverse judgments merely because from a reading of the record it seems to us that the verdict is not supported by the evidence, and it is not true that the preponderance of the evidence on any controverted fact can be determined by counting the witnesses that testified on this one side and the other. It is true that the number of witnesses testifying for or against a given statement of fact is important and to be considered, and obviously true, as has been stated in substance by the courts in cases cited by appellant, that where no reason appears for discrediting witnesses there is no preponderance of evidence when one witness testifies to a fact and another denies it; but what reasons, not apparent to the reviewing court, may exist and be apparent to the jury and the trial court who heard them testifty is a common sense proposition that has been again and again recognized by the courts. From a careful examination of the record we cannot say that the verdict is clearly and

manifestly against the weight of the evidence. Some question is made as to some small amount that was overpaid by mistake, but there is no argument that the judgment is excessive and appellant in his brief only presents the question whether the contract made between the parties included the heating plant, therefore we have considered no other question.

The judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6083.

Rosa Reeves, appellee

vs Appeal from Peoria.

Peoria Railway Company, appellant.

Carnes, J.

Rosa Reeves, the appellee, was injured September 18, 1908, while a passenger on one of appellant's street cars in alighting therefrom, and brought this suit for damages, claiming that the car stopped for her to alight and while she was doing so it suddenly started and she was thrown to the pavement. There was a jury trial resulting in a verdict and judgment for appellee for $600.00 which judgment was reversed by this court and the cause remanded because of errors of law found in the record. (164 Ill. App. 611.) The cause was redocketed in the circuit court and again tried by another judge thereof, and a jury, resulting in a verdict for $5000.00 in favor of appellee. The court after overruling appellant's motion for a new trial, entered judgment on the verdict, from which judgment this appeal is taken.

It is claimed by appellant that appellee was injured because of attempting to alight from the car before it stopped. The claim of each party is supported by direct and clear evidence The testimony of appellee and witnesses introduced by her makes a clear case of due care on her part and negligence of appellant. The testimony introduced by appellant makes a clear case of due care on its part and negligence by appellee. It was the province of the jury to ascertain the truth from the conflicting testimony of these witnesses. While there was a direct conflict, it can, in part at least, be reconciled without imputing wilful perjury if we remember the contradictory statements that intelligent people usually make as to an

Gen. No. 6688.

Rose Reeves, appellee

vs Appeal from Peoria.

Peoria Railway Company, appellant.

Carmen, J.

Rose Reeves, the appellee, was injured September 10, 1904, while a passenger on one of appellants street cars in alighting therefrom, and brought this suit for damages, claiming that the car stopped for her to alight and while she was doing so it suddenly started and she was thrown to the pavement. There was a jury trial resulting in a verdict and judgment for appellee for $800.00 which judgment was reversed by this court and the cause remanded because of errors of law found in the record. (164 Ill. App. 611.) The cause was remanded in the circuit court and again tried by another judge thereof, and a jury, resulting in a verdict for $3000.00 in favor of appellee. The court after overruling appellant's motion for a new trial, entered judgment on the verdict, from which judgment this appeal is taken.

It is claimed by appellant that appellee was injured because of attempting to alight from the car before it stopped. The claim of each party is supported by direct and clear evidence. The testimony of appellee and witnesses introduced by her make a clear case of due care on her part and negligence of appellant. The testimony introduced by appellant makes a clear case of due care on its part and negligence by appellee. It was the province of the jury to ascertain the truth from the conflicting testimony of these witnesses. While there was a direct conflict, it can, in part at least, be reconciled without impeaching wilful perjury if we remember the contradictory statements that intelligent people usually make as to an

occurrence involving the confusion incident to such an accident. Appellant produced the larger number of wit esses in support of its theory of the accident. There is some variance in the testimony of these witnesses, and the opportunities of the various witnesses for both parties for observing what happened were not the same. There is a fair question whether the finding of negligence of the defendant and due care of the plaintiff involved in the verdict is sustained by the preponderance of the evidence. But two juries hade rendered verdicts based on this finding, and those verdicts have been sanctioned by two different trial judges. Whatever might be our view of this question, if this were the first trial, we do not feel warranted in now holding that the verdict on this question is so manifestly against the weight of the evidence as to permit a reversal of the judgment on that ground.

Appellee was at the time of the accident a married woman about thirty five years old. There is no question that she fell upon the sidewalk striking her back and head and was rendered unconscious, and continued in bed for several weeks, and afterwards a fistula formed which was removed. Two operations hre said to have been undergone, since the accident, one for fistula and one for removal of the womb. It is not claimed by appellee that the conditions necessitating those operations are proven to be attributable to the shock and injury received from the accident, and it is said that any opinion on the subject is purely speculative, but that the severe shock and ~~xxxxxx~~ serious injury she received must have had as much, or more to do with bringing about these conditions as anything else. Appellee said an operation for fistula was performed by Dr. Hanna September 19, 1910 two years after the accident, and she said another operation was performed by Dr. Meloy in January 1914, As to the operation of September19

measures involving the confusion incident to such an accident. Appellant produced the larger number of witnesses in support of its theory of the accident. There is some variance in the testimony of these witnesses, and the opportunities of the various witnesses for both parties for observing what happened were not the same. There is a fair question whether the finding of negligence of the defendant and the care of the plaintiff involved in the verdict is sustained by the preponderance of the evidence. But two juries have rendered verdicts based on this finding, and those verdicts have been sanctioned by two different trial judges. Whatever might be our view of this question, if this were the first trial, we do not feel warranted in now holding that the verdict on this question is so manifestly against the weight of the evidence as to permit a reversal of the judgment on that ground.

Appellee was at the time of the accident a married woman about thirty five years old. There is no question that she fell upon the sidewalk striking her back and head and was rendered unconscious, and continued in bed for several weeks, and afterwards a fistula formed which was removed. Two operations are said to have been undergone, since the accident, one for fistula and one for removal of the womb. It is not claimed by appellee that the conditions necessitating those operations are proven to be attributable to the shock and injury received from the accident, and it is said that any opinion on the subject is purely speculative, but that the severe shock and serious injury she received must have had an effect, or more or less influence upon those conditions as anything else. Appellee said an operation for fistula was performed by Dr. Burns September 12, 1910 two years after the accident, and she said another operation was performed by Dr. Maloy in January 1914. As to the operation of September 12

1910, Dr. Hanna testified that on that date he operated upon appellee, removing her appendix, both Fallopian tubes, the right ovary, amputated the neck of the womb, fixed up a bad vaginal outlet, and opened a fistula in connection with the anus; that in his opinion the condition which made the operation necessary was due to infection of the tubes and could not be produced by an accidental injury. He also testified that a fall from a car would not tend to produce prolapsus of the womb. Two other physicians testified to the effect that the conditions making necessary these operations could not have resulted from the injury received at the time of the accident. The medical testimony seems to agree that the cause of the condition which made the operation of September 19, 1910 necessary was an infection, perhaps, though not necessarily, of Gonnorheal origin.

We think it fairly proven that appellee sustained a somewhat severe and serious injury at the time in question; that there was a concussion of the brain and an ordinary abscess that this injury was not the cause of the principal physical trouble of plaintiff at the time of the trial, but that for the most part her then disability resulted from other and independent causes. The injury at the time of and resulting from the accident, caused pain and suffering, and she was entitled to a substantial verdict because thereof; but we are of the opinion that the verdict of $5000.00 is so excessive as to be manifestly against the weight of the evidence, that a verdict for half that amount is the extreme limit of what she should have been allowed under the evidence in the case.

Appellee argues that there was ~~xxxxxxxxxxx xxxxx~~ substantial error in refusing its instruction number 6 by which it was sought to inform the jury that appellee had failed to produce any competent evidence tending to prove that she has

1910, Dr. Hanna testified that on that date he operated upon appellee, removing her appendix, both Fallopian tubes, the right ovary, amputated the neck of the womb, fixed her a bad vaginal outlet, and opened a fistula in communication with the anus; that in his opinion the condition which made the operation necessary was due to infection of the tubes and could not be produced by an accidental injury. He also testified that a fall from a car would not tend to produce the lesions of the womb. Two other physicians testified to the effect that the conditions making necessary these operations could not have resulted from the injury received at the time of the accident. The medical testimony seems to agree that the cause of the condition which made the operation of September 19, 1910 necessary was an infection, perhaps, though not necessarily, of Gonorrheal origin.

We think it fairly proven that appellee sustained a somewhat severe and serious injury at the time in question; that there was a concussion of the brain and an ordinary abscess; that this injury was not the cause of the principal physical trouble of plaintiff at the time of the trial, but that for the most part her then disability resulted from other and independent causes. The injury at the time of and resulting from the accident, caused pain and suffering, and she was entitled to a substantial verdict because thereof; but we are of the opinion that the verdict of $5000.00 is so excessive as to be manifestly against the weight of the evidence, that a verdict for half that amount is the extreme limit of what she should have been allowed under the evidence in the case.

Appellee argues that there was ~~substantial~~ some substantial error in refusing the instruction number 6 by which it was sought to inform the jury that appellee had failed to produce any competent evidence tending to prove that she was by Dr. Maloy in January last, as by the operation [illegible]

paid or become liable to pay any amount of money for hospital bill or for the services of any physician or surgeon. It is true so far as we can see, that there was no competent evidence as to any certain amount paid or liability incurred for hospital bill. Appellee testified she could not say how much the bill was, but there was proof that she was at the hospital and received attendance there, which perhaps tended to show that some payment had been made or liability incurred. Evidence was offered by appellee that a bill for physicians' services had been incurred, in connection with her injuries, in the amount of over $200.00. It is suggested by appellant that this instruction is good notwithstanding that evidence, because the bill might have been presented to, or paid by the husband, which appellee answers by calling attention to our statute and decisions thereunder making either husband or wife liable for family expenses including medical services furnished to either. The instruction was properly refused, if there was any evidence tending to show liability, even though that evidence might be unsatisfactory. We do not think the court erred in ~~refusing xxx~~ refusing it.

No other error is assigned that we consider of sufficient importance to require discussion.

We are of opinion that the judgment for $5000.00 should not be permitted to stand and should be reversed and the cause remanded unless appellee enters a remittitur of the sum of $2500.00 This opinion will be lodged with the clerk of this court and appellee's counsel notified and if, within seven days, a remittitur of that amount is entered the judgment will be affirmed at appellee's costs. Otherwise it will be reversed and the cause remanded.

Appellee having entered a remittitur herein in the sum of Twenty five Hundred Dollars, the judgment is therefore affirmed in the sum of Twenty Five Hundred Dollars at the costs of appellee.

paid or become liable to pay any amount of money for hospital bill or for the services of any physician or surgeon. It is true so far as we can see, that there was no competent evidence as to any certain amount paid or liability incurred for hospital bill. Appellee testified she could not say how much the bill was, but there was proof that she was at the hospital and received attendance there, which perhaps justified in what she personal had - was made or liability incurred. Evidence was offered by appellee that a bill for physicians' services had been incurred, in connection with her injuries, in the amount of over $300.00. It is suggested by appellant that this instruction is not authorized by the evidence, because the bill might have been presented to, or paid by the husband, which appellee answers by calling attention to our statute and decisions thereunder making either husband or wife liable for family expenses including medical services furnished in either. The instruction was properly refused. If there was any evidence tending to show liability, even though that evidence might be unsatisfactory, We do not think the court erred in ~~making the~~ refusing it.

No other error is assigned that we consider of sufficient importance to require discussion.

We are of opinion that the judgment for $3000.00 should not be permitted to stand and should be reversed and the cause remanded unless appellee enters a remittitur of the sum of $2800.00. This opinion will be lodged with the clerk of this court and appellee's counsel notified and if, within seven days, a remittitur of that amount is entered the judgment will be affirmed at appellee's costs. Otherwise it will be reversed and the cause remanded.

Appellee hereby entered a remittitur which is the sum of Twenty Five Hundred Dollars in the amount of Twenty Five Hundred Dollars at the costs of appellee.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6088.

Richard A. Smith, appellee

vs Appeal from Lake.

Fred Grabbe, et al

Delos R. Ames, et al appellants.

Carnes, J.

This is an appeal from a judgment against the four appellants, Delos R. Ames, Henry C.W. Meyer, Herman Stelling and Martin Morse, rendered in favor of Richard A. Smith, the appellee, on an amended declaration in assumpsit charging the joint liability of the appellants, and Fred Grabbe, George H. Radke, W. D. Griffith and F. B. Towner, on a promissory note described in the declaration as given by said eight men jointly to one A. R. Thompson, and by Thompson assigned to appellee.

It is agreed by counsel that the evidence shows that these eight men gave Thompson their three promissory notes, in form joint and several, for $600.00 each, due October 1st. 1903, 1904 and 1905 respectively; that each of the eight men signed each of the three notes, and none of them signed any other note of that description; that soon after the notes were given, Thompson sold and assigned the two notes last maturing to appellee; that those two notes were paid, and there is no question about their genuineness; that afterwards Thompson sold and assigned to appellee what purported to be the other of said notes, which is the note sued on; that afterwards it became known to appellee and some of the makers of the notes that there were outstanding a dozen or more sets of skillfully forged duplicates of these three notes, and the makers refused to pay the note here in controversy claiming it to be a forgery. But they have never paid the genuine note of this description.

On September 11, 1913, a few days before the ten year statute of limitations would run on this note, this suit was brought

Gen. No. 6088.

Richard A. Smith, appellee

vs. Appeal from Cook.

Fred Crawford, et al

Delos R. Ames, et al appellants.

Carter, J.

This is an appeal from a judgment against the four appellants, Delos R. Ames, Henry C.W. Meyer, Herman Stallting and Keith Morse, rendered in favor of Richard A. Smith, the appellee, on an amended declaration in assumpsit charging the joint liability of the appellants, and Fred Crawford, George E. Sadke, E. D. Griffith and F. B. Towner, on a promissory note described in the declaration as given by said eight men jointly to one A. R. Thompson, and by Thompson assigned to appellee.

It is agreed by counsel that the evidence shows that these eight men gave Thompson their three promissory notes, in form joint and several, for $800.00 each, due October 1st. 1903, 1904 and 1905 respectively; that each of the eight men signed each of the three notes, and none of them signed any other note of that description; that soon after the notes were given, Thompson sold and assigned the two notes last maturing to appellee; that these two notes were paid, and there is no question about their genuineness; that afterwards Thompson sold and assigned to appellee what purported to be the other of said notes, which is the note sued on; that afterwards it became known to appellee and some of the makers of the notes that there were outstanding a dozen or more notes of similar forged signatures of these three men, and the maker refused to pay the note here in controversy claiming it to be a forgery. But they have never paid the genuine note of this description.

On September 11, 1912, a few days before the ten year statute of limitations would run on this note, this suit was brought

and summons issued against seven only of the eight makers of the note (omitting Turner). Afterwards a declaration was filed describing the note in question except the omission of any mention of Towner, and counting on the joint liability of the seven defendants thereon. A true copy of the note, including the signature of Towner, was filed with the declaration as a copy of the instrument sued on. Griffith is a non-resident, and was not served with summons. The other six defendants appeared, filed a plea of the general issue, and affidavits of each of them denying his signature to the note. A jury was empanneled to try the issues so formed, but during the trial on motion of appellee, a juror was withdrawn and leave given to amend the declaration (Appellee says here that this was done because he then believed that there was a variance between the note offered in evidence and the note described in the declaration) An amendment to the declaration was filed more than ten years after the note was due, making Towner a co-defendant, and describing the note as a joint note of the eight men instead of seven, and counting on the joint liability of the eight men. The pleas on file were allowed to stand to the amendments. No summons was issued for Towner, and, there still being no service on Griffith, the other six defendants are shown by the record proper to have filed a plea of the ten year statute of limitations and it is there shown that the plea was stricken from the files on motion of plaintiff and over the objection of the defendants. No such motion or objection appears in the bill of exceptions. There was a jury trial and a verdict against the eight defendants (including the two not served with summons or appearing) for $987.75. The court granted a new trial on motion of the six defendants appearing. There was afterwards another jury trial, and a verdict against the six defendants appearing for $981.17. No witnesses testified to the genuineness of the signature of Grabbe and Radke, and after verdict

and summons issued against seven only of the eight makers of the note (omitting Turner). Afterwards a declaration was filed describing the note in question except the omission of any mention of Tomer, and counting on the joint liability of the seven defendants thereon. A true copy of the note, including the signature of Tomer, was filed with the declaration as a copy of the instrument sued on. Griffith is a non-resident, and was not served with summons. The other six defendants appeared, filed a plea of the general issue, and affidavits of each of them denying his signature to the note. A jury was impaneled to try the issues so formed, but during the trial on motion of appellee, a juror was withdrawn and leave given to amend the declaration (Appellee says that this was done because he then believed that there was a variance between the note offered in evidence and the note described in the declaration). An amendment to the declaration was filed more than ten years after the note was due, making Tomer a co-defendant, and describing the note as a joint note of the eight men instead of seven, and counting on the joint liability of the eight men. The pleasure file were allowed to stand x to the amendments. No summons was issued for Tomer, and, there still being no service on Griffith, the other six defendants are shown by the record proper to have filed a plea of the ten year statute of limitations and it is there shown that the plea was stricken from the files on motion of plaintiff and over the objection of the defendants. No such motion or objection appears in the bill of exceptions. There was a jury trial and a verdict against the eight defendants (including the two not served with summons or appearing) for $287.75. The court granted a new trial on motion of the six defendants appearing. There was afterwards another jury trial, and a verdict against the six defendants appearing for $281.17. No witnesses testified to the genuineness of the signature of Crabbe and Hadke, and after verdict

appellee dismissed as to them, but did not amend his pleadings. The court overruled the four appellants' motions for a new trial and in arrest of judgment, and entered judgment against them for the amount named in the verdict.

Appellants devote a part of their brief to the question of the legal effect of adding forged signatures to the genuine signatures on a note. This question is assumed to be raised by the supposition that some of the signatures on the note offered in evidence may be genuine and some of them forged. It is true that under the evidence of witnesses as to the handwriting of these several makers, considered alone, such a conclusion might reasonably be reached. But it is agreed by counsel that these eight men signed one note, and none of them signed any other note of this description, and there seems no ground for any other conclusion. It conclusively follows that the note offered in evidence was either the genuine note of the eight men, or it was a forgery as to each and all of them. Therefore, we see no reason for discussing a proposition of law not applicable to the admitted facts. The controlling question presented here is whether, when a joint cause of action is alleged in the declaration against several obligors on a note, a judgment can stand against a part of them on proof of their liability and non-liability of the others sued jointly with them. The common law, so often recognized by the courts as to make citation of authorities superfluous, is that when a joint cause of action <u>ex contracto</u> is alleged it must be proved as alleged against all the defendants, unless a defense personal to some of them is interposed, with certain modifications of the rule in case one or more of the obligors are dead, which need not be here considered, because while the evidence showed that Towner was dead at the time of the trial it did not appear whether he died before the suit was begun, and the other three defendants were certainly alive at the time of the judgment.

appellee dismissed as to them, but did not amend his pleadings. The court overruled the four appellants' motions for a new trial in arrest of judgment, and entered judgment against them for the amount named in the verdict.

Appellants devote a part of their brief to the question of the legal effect of adding forged signatures to the genuine signatures on a note. This question is assumed to be raised by the supposition that some of the signatures on the note offered in evidence may be genuine and some of them forged. It is true that under the evidence if witnesses as to the handwriting of these several makers, considered alone, such a conclusion might reasonably be reached. But it is agreed by counsel that these eight men signed one note, and none of them signed any other note of this description, and there seems no ground for any other conclusion. It conclusively follows that the note offered in evidence was either the genuine note of the eight men, or it was a forgery as to each and all of them. Therefore, we see no reason for discussing a proposition of law not applicable to the admitted facts. The controlling question presented here is whether, when a joint maker of a note is alleged in the declaration against several obligors on a note, a judgment can stand against a part of them on proof of their liability and non-liability of the others, and jointly sued. The common law, so often recognized by the courts as to make citation of authities superfluous, is that when a joint cause of action ex contracto is alleged it must be proved as alleged against all the defendants, unless a defense personal to some of them is interposed. With certain modifications of the rule in case one or more of the obligors are dead, which need not be here considered, because while the evidence showed that Towner was dead at the time of the trial it did not appear whether he died before the suit was begun, and the other three defendants were certainly alive at the time of the judgment.

Therefore unless there is some statutory provision permitting a recovery in this case, the judgment must be reversed. Sections 7 a, and 7 b. of our Negotiable Instruments act, Hurd's Revised Statutes, Chap. 98 being sections 2 and 3 of the amendatory act of 1895, J. & A. 7625, 7630 Annotated Statutes, Vol. 4 page 4369- provide that persons severally liable upon promissory notes, payable in money, may all or any of them severally be included in the same suit at the option of the plaintiff and for judgment in such suit. The parties do not discuss that statute, and appellee does not claim to be aided by it. Under the authority of that statute appellee might have alleged the several liability of as many of these signers as he chose on this joint and several note, and joined them in one suit, and on proper obtained judgment against them, but he did not exercise the option given him by that statute to so sue, and we do not think the statute abrogates the common law rule requiring a plaintiff to prove a joint liability of several defendants where he alleges such joint liability. Therefore this judgment must be reversed. We remand the cause because the declaration is capable of amendment to state a cause of action against one or more of the makers of the note. Whether a declaration so amended would state a new cause of action and be open to a plea of the statute of limitations we will not now determine. We cannot know that such a defense would be interposed. A question whether the amended declaration on which this judgment was entered stated a new cause of action and was open to the plea of the statute is suggested by appellants' counsel, in their argument, but is not included in their points made for reversal or in their brief of authorities, and the suggestion is answered by appellee by the assertion that it did not state a new cause of action and that the point is not preserved for review in the record, without citing any authority upon the question whether a new cause of action is stated. Under these circumstances we are not inclined

Separate unless there is some statutory provision permitting a recovery in this case, the judgment must be reversed. Sections 7 a, and 7 b, of our Equitable Interpleader act, Bond's Revised Statutes, Chap. 88, being sections 2 and 3 of the ninteenth act of 1883, 1. R. A. Annotated Statutes, Vol. 4 page 4323- provide that persons severally liable upon promissory notes, payable in money, may all or any of them severally be included in the same suit at the option of the plaintiff and the judgment in such suit. The parties in not thinking that statute, and supposing there was no law to be aided by it, under the authority of this statute appellee might have alleged the several liability of as many of these signers as he chose on this joint and several note, and joined them in one suit, and on proper obtained judgment against them, but he did not exercise the option given him by that statute to so sue, and we do not think the statute abrogates the common law rule requiring a plaintiff to prove a joint liability of several defendants where he alleges such joint liability.

Therefore this judgment must be reversed. We remand the cause because the declaration is capable of amendment to state a cause of action against one or more of the makers of the note. Whether a declaration so amended would state a new cause of action and be open to a plea of the statute of limitations we will not now determine. We cannot know that such a defense would be interposed. A question whether the amended declaration on which this judgment was entered stated a new cause of action and was open to the plea of the statute is suggested by appellants' counsel, in their argument, but is not included in their points made for reversal or in their brief of authorities, and the suggestion is answered by appellee, by the assertion that it did not state a new cause of action and that the point is not preserved for review in the record, without citing any authority upon the question whether a new cause of action is stated. Under these circumstances we are not inclined

to forecast future pleadings and announce rules applicable thereto.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6095.

The Simmons Motor Co. appellant.

vs Appeal from Whiteside.

Ruby B. Dudley, appellee.

Carnes, J.

Ruby B. Dudley, the appellee, purchased an automobile belonging to the Simmons Motor Co. the appellant, of its agent Clark, and paid Clark the agreed purchase price. As between Clark and his principal he was authorized to sell the car but not at that price, and his instructions did not authorize him to receive the pay therefor. Appellant repudiated the sale, and after demand and refusal to deliver the car, replevied it. There was a jury trial and a verdict and judgment for the defendant, and the case is brought here on appeal.

There is practically no dispute as to the evidentiary facts. Appellant was the agent of the Lewis Motor Co., installing local agencies in Illinois and Indiana, and retailing cars in Chicago A few weeks before the transaction in question it employed Clark as its agent to locate agencies in the state of Illinois, and to obtain orders from agents so procured for at least one car, for which he was directed to require a deposit of a certified check or draft, and send it, with the agency contract, to appellant who would ship a car to the local agent. The car in question was furnished Clark by appellant with a chauffeur to drive and take care of it. The list price of the car was $1600.00; dealers price $1250.00. The car was somewhat worn, the speedometer was broken, but showed it had run 2300 miles and appellant authorized Clark to sell it to a dealer for $1175.00 Clark was provided by appellant with circulars, literature. letter heads and cards used in its business. He went out into the state and after doing some business, reached Sterling,

Gen. No. [illegible].

The Simmons Motor Co. [illegible],

vs Appeal from Mitchell.

Ruby B. Dailey, [illegible],

Clark, J.

Ruby B. Dailey, the appellee, purchased an automobile belonging to the Simmons Motor Co. the appellant, of its agent Clark, and paid Clark the agreed purchase price. As between Clark and his principal he was authorized to sell the car but not at that price, and his instructions did not authorize him to receive the pay therefor. Appellant repudiated the sale, and after demand and refusal to deliver the car, replevied it. There was a jury trial and a verdict and judgment for the defendant, and the case is brought here on appeal.

There is practically no dispute as to the evidentiary facts. Appellant was the agent of the Lewis Motor Co., installing local agencies in Illinois and Indiana, and retailing cars in Chicago a few weeks before the transaction in question it employed Clark as its agent to locate agencies in the state of Illinois, and to obtain orders from agents so procured for at least one car, for which he was directed to require a deposit of a certified check or draft, and send it, with the agency contract, to appellant who would ship a car to the local agent. The car in question was furnished Clark by appellant with a chauffeur to drive and take care of it. The list price of the car was $1800.00; dealers price $1250.00. The car was somewhat worn, the speedometer was broken, but showed it had run 2300 miles and appellant authorized Clark to sell it to a dealer for $1175.00. Clark was provided by appellant with circulars, literature, letter heads and cards used in its business. He went out into the state and after doing some business, resumed traveling,

Illinois, where appellee was employed as a stenographer for one Burleigh, Manager of the Novelty Iron Works, there located. Burleigh had previous to that time written to appellant and to the company they represented with a view to purchasing a car for his own use. Clark visited Burleigh at his office and in the presence of appellee presented the business card of appellant on which was printed in the lower left hand corner "J. C. Clark, Territory Manager" which words, it seems, were printed there without the knowledge or consent of appellant. He stated he had called in answer to Mr. Burleigh's letters about the car, and produced a letter purporting to come from appellant and written on appellant's stationery, congratulating him on the fine work he was doing and instructing him to sell the car for "I. E. G." He named a price that he said those letters indicated, nine hundred and some odd dollars (the witnesses are not sure as to the exact amount) and said he would take the responsibility of shading it down to $835.00. Clark had procured a public stenographer to write this letter on appellant's letter head without appellant's knowledge or consent. Appellees, being present at the time of this transaction with Burleigh, and knowing what there occurred, called on Clark later the same day. He took her and her family riding in the car and said he had discovered that a bow was broken and offered to sell it to her for $800.00. She accepted the offer and paid him $25.00 to apply on the purchase price and took a receipt signed by him. She made a further cash payment to Clark of $200.00 the next day, and on the next day paid him $575.00 the balance of the purchase price, by drafts payable to his order. He then turned over the machine to her/ Meantime he had told her she could act as local agent of appellant and had stated prices and terms to her, and given her literature to be used for that purpose. Shortly thereafter

Illinois, where Arnelle was employed as a time-keeper for one Burleigh, Manager of the Morally Lean Works, were located. Burleigh had previous to that time written to applicant and to the company they represented with a view to purchasing a car for his own use. Clark visited Burleigh at his office and in the presence of witnesses presented the business card of applicant on which was printed in the lower left hand corner "A. C. Clark, Territory Manager" which words, it seems, were printed there without the knowledge or consent of applicant. He stated he had called in answer to Mr. Burleigh's letters already sent, and produced a letter purporting to come from applicant and signed as applicant's representative, requesting him on the time work he was doing and instructing him to sell the car for "I. T. G." He showed a price that he said those letters indicated, nine hundred and some odd dollars (the figures are not sure as to the exact amount) and said he would take the responsibility of sending it down to $800.00. Clark had procured a public stenographer to write this letter on applicant's letter head without applicant's knowledge or consent. Applicant, being present at the time of this transaction with Burleigh, was knowing what there occurred, called on Clark later the same day. He took her and her family riding in the car and said he had discovered that a bow was broken and offered to sell it to her for $800.00. She accepted the offer and paid him $65.00 in money on the purchase price and took a receipt signed by him. She made a further cash payment to Clark of $400.00 the next day, and on the next day paid the balance of the purchase price, in monthly payments to his order. He then turned over the machine to her. Meantime he had told her she could not be legal agent of applicant and had stated orders and terms to her, and given her literature to be used for that purpose. Shortly thereafter

appellee discovered some defects in the car, or missing parts and wrote appellant asking to be supplied with the parts which was the first appellant knew of the transaction. Simmons came to Sterling with an attorney, and, after some conversation with Burleigh and appellee, in which he said Clark had been selling cars for them and was their agent, but was not bonded, replevied the car.

We think appellant correctly states the law as follows:- "The acts of an agent assuming to have authority to sell his principal's personal property will not bind the principal unless he has actually given the agent such authority or has held him out to the public as clothed with it." But a principal may be bound by clothing his agent with apparent authority to do an act that he is not, in fact, authorized to perform. It is no doubt true, as appellant states that, "A commercial traveler or other agent has not usually authority to sell his samples", and that "Simply entrusting to the agent possession of property confers upon him no authority to sell the same," and that, "A person dealing with an agent must exercise ordinary prudence and reasonable diligence if the character assumed by the agent is of such a suspicious or unreasonable nature or if the authority which he seeks to exercise is of such an unusual or improbable character, as would suffice to put an ordinarily prudent man upon his guard, the party dealing with himmay not shut his eyes to the real state of the case but should either refuse to deal with the agent at all or should ascertain from the principal the true condition of affairs." And questions here raised are whether the appellee did, in dealing with Clark, exercise ordinary prudence and reasonable diligence, and whether the transaction was of an unusual and improbable character that would suffice to put an ordinarily prudent man upon his guard. These are questions

Griffiths discovered some defects in the case, or finding parts had proved appellant making to be supplied with the matter which was the first appellant knew of the transaction.

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of fact to be determined by the jury and the trial judge, subject to review by this court. Facts that must be determined largely on the knowledge of jurors and courts of the common transactions of business life. So far as the judgment rests on a finding of those facts we are not inclined to disturb it. It seems to us that appellee conducted herself in the purchase of the car up to the time of payment for it, in accordance with what we conceive would have been the conduct of a man of ordinary prudence and reasonable diligence similarly situated, and we see nothing of a suspicious or unreasonable nature or of an unusual or improbable character that should have put a reasonable person in appellee's place on inquiry as to the limit of Clark's authority to sell automobiles for appellant. He came to her employer in answer to a letter she had written to appellant for him, her employer, regarding the purchase of an automobile for use, not as a demonstrating car, but for the private use of her employer. He had a car belonging to appellant, his principal, engaged in selling cars, that he offered to sell. He was, in fact, an agent of appellant, authorized to sell the car, and he had with him advertising matter furnished by appellant such as agents ordinarily carry. Suppose Mr. Burleigh had purchased the car. Would he have been expected to ascertain the exact authority of an agent of the company to whom he had written, who appeared in answer to his letter, and offered to sell him a car about which he had inquired in that letter? It is common knowledge that purchasers do not so inquire of agents; that the instructions by principals to their agents as to the price and terms of sale are often, if not ordinarily, concealed from the purchaser, and that statements by agents to purchasers as to price and terms that they, the agents are permitted to make, are often untrue, and therefore the ordinarily prudent business

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man does not ask for such information, and places little reliance on it if given. Mr. Burleigh did not buy the car but appellee did. We see no reason, however, why she, knowing all that Mr. Burleigh knew about Clark's authority, should be held negligent in doing what we suppose Mr. Burleigh might have properly have done had he concluded to buy the car

It is true that a sagacious careful business man might not and probably would not, have paid for the car in the way appellee did, but that he would draw a check or draft payable to appellant instead of to his agent. But if the jury's finding must rest on a conclusion that the ordinarily prudent person would, under the circumstances, have paid for the car in the way appellee did to the agent instead of the principal, we are not disposed to disturb that finding. No doubt there are many people who, under such circumstances in purchasing an article, would pay an agent direct, if requested by him to do so, and the jury may reasonably have concluded that the ordinarily prudent man, who is always suggested as a standard, would have done the same thing. In most cases intelligent people much differ about what that "ordinarily prudent man" would have done under similar circumstances, and a layman is as capable of determining that fact as a lawyer.

On the proposition that a commercial traveler has not usually authority to sell his samples, appellant cites Bailey v Pardridge 134 Ill. 188, which holds that payment to a traveling salesman taking orders for future shipment of goods is not good because the agent is not in possession of the goods, but that, as a general rule, an agent in possession of the goods sold has an implied authority to receive

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On the proposition that a commercial traveler has not usually authority to sell his samples, appellant cites Bailey v Partridge 134 Ill, 188, which holds that payment to a traveling salesman taking orders for future shipment of goods is not good because the agent is not in possession of the goods, but that, as a general rule, an agent in possession of the goods sold has an implied authority to receive

payment for the goods when sold by him. This is the only Illinois case cited by appellant under that head; but we assume that ordinarily one dealing with an agent selling by sample should take notice of the fact that samples, so used, are not generally put in the agent's hands for sale. But in this case the sample was put in Clark's hands for sale, and the jury evidently thought there appeared nothing suspicious in his offering it for sale in the way that he did to Mr. Burleigh and afterwards to appellee.

Appellee cites several authorities on the general proposition that the power to sell goods implies power to collect the price, which we do not understand appellant's counsel to deny. Appellant quotes many authorities and argues much on the proposition that an agent cannot bind his principal beyond his authority. It may be said in answer to this line of argument, as was said by the court in Williams v Fletcher 139 Ill. 356, that this is true as a general rule applicable to property, but only true where no other element intervenes that , "Where the true owner holds out another, or allows him to appear, as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power, which, ~~though~~ through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." While there is practically no dispute as to what was said and done in this case, it does not follow that there is no controversy about the facts and nothing left to be done but to

protect the goods when sold by him. This is the only Illinois case cited by appellant which is that, but we do not find it applicable to the facts in this case. The example should take account of the fact that example, so used, are not generally put in the agent's hands for sale. But in this case the sample was put in Clark's hands for sale, and the jury evidently thought that's operated nothing suspicious in his offering it for sale in the way that he did to Mr. Burleigh and other dealers in samples.

Appellant cites several authorities on the general proposition that the power to sell goods implies power to collect the price, but we do not understand appellant's counsel to dispute the proposition that an agent cannot bind his principal beyond his authority. It may be said in answer to this line of argument, as was said by the court in Williams v Tarbener 109 Ill. 496, that this is true as a general rule applicable to property, but only true when no other element intervenes. "Where the true owner holds out another, or allows him to appear, to the owner of or to having full power of disposition over the property, the innocent third parties are thus led into dealing with such apparent owner, and will be protected. Their rights in such cases is not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the true owner, which removes him from disputing, as against them, the existence of the title or power, which, through negligence or misplaced confidence, he caused or allowed to appear to be vested in the party making the conveyance." While there is practically no dispute as to that law and from in this case, it does not follow that there is no controversy about the facts and nothing left to be done but to

apply the law to the admitted facts, which would leave nothing for the jury to determine. There are, as we have seen, conclusions of fact to be drawn from the admitted words and deeds of the parties to the controversy. Therefore there were questions for the jury to determine, and in our opinion they were not, in any view of the case, sufficiently clear to permit a court to direct a verdict. It is suggested by appellant's counsel that the jury may have been prejudiced and influenced by the fact that the defendant is a woman and the plaintiff a non-resident company or corporation. We do not ignore the consideration that in such cases juries are sometimes so influenced, and that it is the duty of courts to control verdicts that they believe have been so reached; but under the circumstances of this case we think it more than probable that the same verdict would have been reached had the defendant been a man and the plaintiff another man with no reason to suppose that the jury might be biased by the personality of the parties. We do not think the verdict should be regarded or held as so obtained, and do not think it so manifestly against the weight of the evidence as to permit a reversal here on that groubd. Appellant's counsel calls our attention to four different pages of the record in which he argues that error prejudicial to him occurred in the rulings of the court on testimony. The abstract prepared by him shows none of these matters objected to. It has been often said by this and other reviewing courts that the appellant must present in his abstract of record the matter that he ~~xxxxx~~ relies on for a reversal, and that a reviewing court will not go into an examination of the record to see if errors have been committed in matters not abstracted. The suggestions, however, do not seem to indicate errors of much, if any, controlling importance.

apply the law to the admitted facts, which would leave nothing for the jury to determine. There are, as we have seen, situations of fact to be drawn from the admitted facts and usually if the parties to the controversy. Therefore there were questions for the jury to determine, and in our opinion they were not, in our view of the case, sufficiently clear to permit a court to direct a verdict. It is suggested by appellant's counsel that the jury may have been prejudiced and influenced by the fact that the defendant is a woman and the plaintiff a non-resident company or corporation. We do not ignore the consideration that in such cases juries are sometimes so influenced, and that it is the duty of courts to control verdicts that they believe have been so rendered; but under the circumstances of this case we think it more than probable that the same verdict would have been reached had the defendant been a man and the plaintiff another man with no reason to suppose that the jury might be biased by the personality of the parties. We do not think the verdict should be regarded or held as so obtained, and do not think it so manifestly against the weight of the evidence as to permit a reversal here on that ground. Appellant's counsel calls our attention to four different pages of the record in which he argues that error prejudicial to him occurred in the rulings of the court on testimony. The abstract prepared by him shows none of these matters objected to. It has been often said by this and other reviewing courts that the appellant must present in his abstract or record the matter that he seeks relief on for a reversal, and that a reviewing court will not go into an examination of the record to see if errors have been committed in cases not abstracted. The suggestions, however, do not seem to indicate errors of such, if any, controlling importance.

The court gave the jury of its own motion a general instruction intended to cover all the issues involved, and appellant complains that in this instruction the court told the jury to inquire from the evidence whether appellant, by its actions, justified the defendant in the belief, etc., when it is said he should have told the jury that the question was whether a reasonably prudent person, or one acting with ordinary diligence, or one acting reasonably under the circumstances, would have done what appellee did, and it is assumed that the jury may have concluded that appellee would be protected in acting imprudently and unreasonably in the matter. The instruction is not free from criticism on that ground, but we think it hardly possible that the jury was misled thereby. The distinction is too technical to affect the mind of a layman. Error in refusing instructions offered by the appellant is suggested. We have examined the instructions named and are of the opinion that the court did not err in refusing them, and that the jury was fairly instructed on the law of the case. Finding no reversible error in the record the judgment is affirmed.

Affirmed.,

The court may not of its own motion a [illegible] instruction to cover all the issues involved, but [illegible] that to give instruction the court told the jury to decide from the evidence whether a [illegible], by its actions, [illegible] in the belief, etc., [illegible] the jury then the question [illegible] or the acting reasonably under the circumstances, would have done [illegible], and it is assumed that the jury may have concluded that [illegible] would be regarded as acting in ignorance and unreasonably in the matter. The last motion is not here with criticism on that ground. [illegible] The instruction is the technical to object to a kind of a [illegible] error in refusing instructions offered by the [illegible] is [illegible]. We have examined the instructions [illegible] and are of the opinion that the court did not err in refusing them, and that the jury was fairly instructed on the law of the case. Finding no reversible error in the record the judgment is affirmed.

[illegible]

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6098

Geo. E. Edmondson, for use.

appellant.

vs Appeal from Peoria.

Rudolph Pfeiffer, appellee.

Carnes, J.

Appellants, Warners Features Co. Inc. and Kingman & Co., each had a judgment in a justice court against Geo. E. Edmondson, the former for $75.00 and costs, and the latter for $63.30, and costs, and separate proceedings in garnishment were pending in the circuit court of Peoria County against Rudolph Pfeiffer, the appellee, to collect those judgments. By agreement of parties the cases were heard together by the circuit court without a jury on a stipulation of facts, and a judgment for the defendant was entered in each case, and each of the appellants prayed and has perfected an appeal to this court. They have included the proceedings in both cases in one record filed here. Both cases involve the same question, which is presented and argued by counsel in their briefs as though they both arose in the same proceeding, and we will ~~discuss~~ so discuss it in this opinion.

On October 1st. 1914. Edmondson entered into a contract with appellee to provide material and perform the work for the erection and completion of two two story frame houses on certain premises of appellee in the city of Peoria, for an agreed price of $7800.00 the work to be completed by January 1st. 1915. The work was to be done under the supervision of an architect and finally settled for ~~hx~~ on his certificate after it had been completed and accepted. If Edmondson defaulted appellee was authorized to take possession of the premises and employ others to complete the building, the ex-

Gen. Ia. 6238

Gen. T. Dunnigan, for app.

Appellant.

vs.

Appeal from Peoria.

Nicholas Vlattler, appellee.

Curran, J.

Appellants, Farmers Feature Co. Inc. and Michigan & Co., each had a judgment in a justice court against Mr. E. Edmonson, the former for $75.00 and costs, and the latter for $43.50, and costs, and separate proceedings in garnishment were pending in the circuit court of Peoria County against Nicholas Vlattler, the appellee. By agreement of parties the cases were heard together by the circuit court without a jury on a stipulation of facts, and a judgment for the defendant was entered in each case, and each of the appellants prayed and has perfected an appeal in this court. They have included the proceedings in both cases in one record filed here. Both cases involve the same question, which is presented and argued by counsel in each brief as though they both arose in the same proceeding, and we will dispose of them as in this opinion.

On October 1st, 1914, Edmonson entered into a contract with appellee to provide material and perform the work for the erection and completion of two two story frame houses on certain premises of appellee in the city of Peoria, for an agreed price of $7800.00 the work to be completed by January 1st, 1915. The work was to be under the supervision of an architect and finally settled for by him on his certificate after it had been completed and accepted. If Edmonson defaulted appellee was authorized to take possession of the premises and employ others to complete the building, the ex-

pense of so doing to be taken into account in the final settlement between the contractor and appellee.

It was further provided (and this is the provision to be construed in determining this controversy) that Edmondson should on Saturday of each week furnish appellee an itemized statement of the amount of the pay roll for all labor employed by him upon the buildings during the week, and that appellee should pay Edmondson an amount equal to that pay roll and that Edmondson should on the following Monday give to appellee a receipt for payment in full for labor for each workman named in the pay roll, and it was provided that this clause of the contract means and shall be construed to mean that the amount of the pay roll so paid to Edmondson is delivered to him for the express purpose of paying said pay roll and is in no sense a payment to him, and shall be used by him for no other purpose.

The stipulation of facts recites that on November 14, 1914, in pursuance of said contract, Edmondson presented to appellee an itemized statement of the pay roll for that week amounting to $360.20 and xx received appellee's check for that amount, and on the following Monday Edmondson presented to appellee the receipt for the items of the payroll and said check was paid, and that five days later (November 21) Edmondson abandoned the contract and received no further payments from appellee, and that a party who had guaranteed the performance of Edmondson's obligations under the contract undertook the completion of the job.

Garnishee summons in these cases had been served on appellee before he xx paid this pay roll. Appellee made payment on the supposition that he was obligated by the contract to so do for the benefit of the workmen named, and that it was not an obligation from him to Edmondson to pay

paid, if so doing, to be taken into account in the final settlement between the contractor and appellee.

It was further provided (and this is the provision to be construed in interpreting this agreement) that Edmondson should on Saturday of each week furnish appellee an itemized statement of the amount of the pay roll for all labor employed by him upon the buildings during the week, and that appellee should pay Edmondson an amount equal to that pay roll and that Edmondson should on the following Monday give to appellee a receipt for payment in full for labor for such workmen under his pay roll, and it was provided that claims of his subcontractors should be considered in such that the amount of the pay roll so paid to Edmondson is delivered to him for the express purpose of paying said pay roll and is in no sense a payment to him, and shall be used by him for no other purpose.

The stipulation of facts recites that on November 14, 1911, in pursuance of said contract, Edmondson presented to appellee an itemized statement of the pay roll for that week amounting to $380.80 and xx received appellee's check for that amount, and on the following Monday Edmondson presented to appellee the receipt for the items of the payroll and said check was paid, and that five days later (November 21) Edmondson abandoned the contract and received no further payments from appellee, and that a party who had guaranteed the performance of Edmondson's obligations under the contract undertook the completion of the job.

Garnishee summons in these cases had been served on appellee before he xx paid this pay roll. Appellee made payment in the assumption that he was relieved in the manner it to do for the benefit of the workmen named, and that it was not an obligation from him to Edmondson xx pay

money that he should withold because of the service of the garnishee summonses. It does not appear that there was anything due Edmondson or to become due unless this payment by appellee is taken as an admission that there was that amount due him at the time the payment was made. Appellants argue that it should be so taken and considered, and cite Wilcus v Kling, 87 Ill. 107, and Western Valve Co. v Quay-Dakin Co. 177 Ill. App. 548 in support of that contention. This is the only suggestion by appellants of error in the case.

In the first cited case the court held that the garnishee defendant was liable because he had admitted an indebtedness by making a payment on account of the ~~xxxxxxx~~ builder after he was served with process, and that it did not matter that the builder could not have recovered anything in a suit against the owner at that time because an architect's certificate had not been furnished, as required by the contract. The other case only reiterates this proposition of law. In neither case was the question here presented involved, therefore neither of them is ~~xxxxxxxxxx~~ controlling or even important, in determining that question.

We are of the opinion that the language of the contract in question here should be construed as creating a liability of appellee to the workmen named in the pay roll. Appellee had directly promised to pay that sum for the benefit of the workmen. It is probable that the provision in the contract was there placed for the protection of appellee against liability on liens that might have been served by the workmen if the amount had not been paid them. The trial judge did not err in so construing the contract.

There was included in the payment in question $10.00 for Edmondson, who it seems was labering on the contract and was the head of a family. No suggestion is made in appellants'

brief that we should consider this item of $10.00 on any different basis from that of the balance of the payment, and we assume, that no serious question can arise thereon.

The judgment in each case is affirmed.

money that he should withold because of the service of the plaintiffs summons. It does not appear that there was anything due Simonsen or is issue the claim that payment to appellee is taken as an admission that there was that amount due at the time the payment was made. Appellants argue that it should be so taken and considered, and cite Wilcox v Kling, 87 Ill. 107, and Western Union Co. v Gray-Mann Co. 177 Ill. App. 548 in support of that contention. This is the only suggestion by appellants of error in the case.

In the first cited case the court held that the garnishee defendant was liable because he had admitted an indebtedness by making a payment on account of the building after he was served with process, and that it did not matter that the builder could not have recovered anything in a suit against the owner at that time because an architect's certificate had not been furnished, as required by the contract. The other case only reiterates this proposition of law. In neither case was the question here presented involved, therefore neither is of even importance, in determining that question.

We are of the opinion that the language of the contract in question here should be construed as creating a liability of appellee to the workmen named in the pay roll. Appellee had directly promised to pay that amount for the benefit of the workmen. It is probable that the provision in the contract was there placed for the protection of appellee against liability on claims that might have been asserted by the workmen if the amount had not been paid them. The trial judge did not err in so construing the contract.

There was included in the payment in question $15.00 for Simonsen, who it seems was laboring on the contract and was the head of a family. No suggestion is made in appellants'

brief that we should consider this item of $10.00 on any different basis from that of the balance of the payment, and we assume, that no serious question can arise thereon.

The judgment is each case is affirmed.

order. Did we should consider this item of $10.00 on any divisive basis from that of the balance of the payment, and as answer, did no serious question can arise thereon.

The payment is not made by cheque.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

610

Gen. No. 6105.

Emma Kime, appellee

vs Appeal from Grundy.

Samuel Kime, appellant.

Carnes, J.

Emma Kime, the appellee, filed a bill for separate maintenance against her husband, Samuel Kime, charging him with much misconduct. 761 The answer denied and explained the charges, and accused complainant of much wrong doing. There was a jury trial and a verdict for the complainant and finding that at the time of filing her bill of complaint she was, and that she now is, living separate and apart from her husband without her fault. The decree recites the submission of the issues to the jury and their finding thereon, and motions by the defendant to set aside the verdict and for a new trial overruled by the court, and proceeds with the recital that - "The court finds from the evidence that the complainant was at the time of filing her bill of complaint herein, and is now living separate and apart from the defendant without her fault, as chatged in the bill of complaint filed in this cause," and with further findings of unkind, cruel and inhuman treatment of the complainant by the defendant set out in detail, and that the equities of the cause are with the complainant. The court further finds that there are six living children of the marriage, ranging in ages from five to seventeen years old; that two of them are living with their father and four of them with their mother, and makes no order as to the custody of the children. It is ordered by the decree that the complainant is entitled to a separate maintenance from the defendant, and that she be allowed $50.00 a month for two months, and $60.00 a month thereafter until the further order of the court, to be paid by the defendant, payment of which is made a lien on

Gen. No. 8108.

Dora Kime, appellee

vs

Appeal from Grundy.

Samuel Kime, appellant.

Barrett, J.

Dora Kime, the appellee, filed a bill for separate maintenance against her husband, Samuel Kime, charging him with such misconduct, the statutory grounds and exclusively the charge, and accusing him of such strong drink. There was a jury trial and a verdict for the complainant in finding that at the time of filing her bill of complaint she was, and that she now is, living separate and apart from her husband without her fault. The decree recites the submission of the issues to the jury and their finding thereon, and motions by the defendant to set aside the verdict and for a new trial overruled by the court, and proceeds with the recitals that - "The court finds from the evidence that the complainant was at the time of filing her bill of complaint herein, and is now living separate and apart from the defendant without her fault, as charged in the bill of complaint filed in this cause," and with further findings of merit, equal and inherent treatment of the complainant by the defendant set out in detail, and that the equities of the cause are with the complainant. The court further finds that there are six living children of the marriage, ranging in age from five to seventeen years old; that two of them are living with their father and none of them with their mother, and makes no order as to the custody of the children. It is ordered by the decree that the complainant be entitled to a separate maintenance from the defendant, and that she be allowed $20.00 a month for her maintenance, and $20.00 a month thereafter until the further order of the court, to be paid by the defendant, payment of which it made a lien on

his real estate until he shall give security for his faithful performance. This appeal is prosecuted from that decree and a reversal asked mainly on the ground that the decree is not supported by the evidence. There are over three hundred typewritten pages of the testimony in the record in which each party has disclosed with much fullness its grievances against the other, and denials and explanations of wrong doing charged by the other. We have concluded, after a careful reading of the testimony, that it will serve no useful purpose to discuss these charges, counter charges, denials and explanations in detail, and that in consideration of the future interests of these six minor children it is better that the mistakes and misconduct of their father and mother as related by them under the heat engendered by a family quarrel should not further be set out in detail where it may be perused in future years.

We have concluded, from a reading of the record, that the verdict of the jury and the finding of the chancellor is fully sustained by the evidence, and were we in dount about that, it is still peculiarly a case where conclusions reached with the opportunities that the court and jury had of judging of the credibility of the witnesses should not be disturbed by a reviewing court in the absence of substantial error of law found in the ~~xx~~ record.

Appellant says in his brief under the head of "Errors Relied upon for Reversal" that the court erred in overruling defendant's objections to improper questions propounded by complainant's solicitor, and in support of that assignment of error says the complainant was permitted over the objection of the defendant to answer the leading question - "When was the first time that Mr. Kime struck you?" and that she had theretofore not said that he ever struck her. It is true this question is leading and suggestive and might better have

his real estate until he shall have security for the faithful performance. This appeal is prosecuted from that decree and a reversal asked mainly on the ground that the decree is not supported by the evidence. There are over three hundred typewritten pages of the testimony in the record in which each party has disclosed with much fullness the grievances against the other, and denials and explanations of wrongs doing charged by the other. We have concluded, after a careful reading of the testimony, that it will serve no useful purpose to discuss these charges, counter charges, inferences and explanations in detail, and that in consideration of the interests involved of these six minor children it is better that the mistakes and misconduct of their father and mother be redressed by them under the test afforded by a fairly conducted trial of further be set out in detail where it may be pursued in future years.

We have concluded, from a reading of the record, that the verdict of the jury and the finding of the chancellor is fully sustained by the evidence, and here we in point about that, it be still peculiarly a case where [illegible] the opportunities that the court and jury had of judging of the credibility of the witnesses should not be disturbed by a reviewing court in the absence of substantial error of law found in the ex record.

Appellant says in his brief under the head of "Errors relied upon for Reversal" that the court erred in overruling defendant's objections to improper questions propounded by complainant's solicitor, and in support of that assignment of error says the complainant was permitted over the objection of the defendant to answer the leading question - "When was the first time that Mr. Kline struck you?" And that she had theretofore not said that he ever struck her. It is true this question is leading and suggestive and might better have

been overruled by the court, and the failure to do so might be substantial error if there was any reason to suppose evidence that the defendant struck the complainant got into the record in this way more prejudicial to the defendant than it would have been but for this question; but an examination of the testimony of the complainant in this connection makes it certain that the defendant was not prejudiced by the ruling of the court in permitting it to be answered.

The only error of law suggested is in giving appellee's instructions to the jury numbered 7, 9 and 10 These instructions were given to inform the jury in relation to the evidence required to establish a charge of adultery, and the effect of a condonation of the offense. We do not understand appellant's counsel to deny that the propositions of law contained in these instructions are correct, but he says there was no charge of adultery by the defendant in the pleadings, and that the defendant as a witness on the trial expressly said that he did not charge her with adultery. However a great part of this family quarrel and disturbance arose from the fact that the defendant was jealous of his wife, and he introduced considerable evidence tending to show that he had cause for such jealousy, and there is no doubt but the jury's attention was directed by the defendant's effort to the question whether the complainant had been guilty of adultery. We are of opinion that in that condition of the record the court did not err in instructing the jury at the instance of the complainant, as to the law on that question.

But questions of error of law in the ~~xxxxxxxxxx~~ introduction of evidence and giving of instructions are of much less importance in this proceeding than they would be in a common law or divorce proceeding where a jury trial is

been overruled by the court, and the failure to do so might be substantial error if there was any reason to suppose evidence that the defendant struck the complainant yet into the record in this way more prejudicial to the defendant than it would have been but for this question; but an examination of the testimony of the complainant in this connection makes it certain that the defendant was not prejudiced by the ruling of the court in permitting it to be answered.

The only error of law suggested is in giving appellee's instructions to the jury numbered 7, 8 and 10. These instructions were given to inform the jury in relation to the evidence required to establish a charge of adultery, and the effect of a condonation of the offense. We do not understand appellant's counsel to deny that the propositions of law contained in these instructions are correct, but he says there was no charge of adultery by the defendant in the pleadings, and that the defendant as a witness on the trial expressly said that he did not charge her with adultery. However a great part of this lengthy quarrel and testimony arose from the fact that the defendant was jealous of his wife, and he introduced considerable evidence tending to show that he had cause for such jealousy, and there is no doubt but the jury's attention was directed by the defendant's effort to the question whether the complainant had been guilty of adultery. We are of opinion that in that condition of the record the court did not err in instructing the jury as to the instance of the complainant, as to the law in that question.

But questions of error of law in the admission or introduction of evidence and giving of instructions are of such less importance in this proceeding than they would be in a common law or jurors proceeding where a jury trial is

a matter of right. In a separate maintenance proceeding the verdict of a jury is only advisory. The judge may adopt the verdict or disregard it and enter such a decree as in his judgment equity demands. Berg v Berg 223 Ill. 209. The chancellor evidently so understood the law, and as we have before pointed out, based his decree and findings on the evidence introduced before him.

No other error is suggested by appellant, and being of the opinion that the errors suggested are not ~~xxxk~~ well assigned, the decree is affirmed.

Decree affirmed.

a matter of right. In a negligence maintenance proceeding the verdict of a jury is only advisory. The judge may adopt the verdict or disregard it and enter such a decree as in his judgment equity demands. Peng v Peng 200 Ill. App. 109. The chancellor primarily is undertaken the law, and is we have before pointed out, judge the facts and findings on the evidence introduced herein.

The claim that is supported by substantial, and being of the opinion that the court acquired are not very well analyzed, the decree is affirmed.

Decree affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6111.

Burton A. Hitchcock, Excr. &c.

appellee

vs Appeal from Peoria.

The Board of Home Missions &c.

et al Appellants

Carnes, J.

This case has been before this court before (Hitchcock v Board of Missions, 175 Ill. App. 87) and before the Supreme Court on appeal from this court (Hitchcock v Bd. of Home Missions 259 Ill. 288) The circuit court had refused to allow solicitor's fees to the Troy Orphan Asylum, appellant here. This court ~~We~~ held that it had erred in so doing, and the supreme court affirmed that part of ~~our~~ the decision of this court and remanded the case with directions "to allow the Troy Orphan Asylum a reasonable solicitor's fee." The cause was redocketed in the circuit court and referred to the master in chancery "for further proceedings as may be necessary to carry out the judgment and order of the said supreme court and not inconsistent therewith, and that the said master take and hear ~~xxxxfs~~ such proofs as may be necessary to determine the same and report his conclusions of law and fact to this court as soon as may be." Appellant appeared before the master and introduced in evidence the testimony that it had theretofore introduced in relation to solicitor's fees at the former hearing, and offered to prove solicitor's services and the value thereof in the Appellate and the Supreme Court after the entry of the final decree in the Circuit Court. The master refused to hear proof or consider the value of such services rendered on appeal and found and reported the sum of $1000.00 as a reasonable, and the usual and customary fee for services rendered prior

Gen. No. 8111.

Burton A. Hibbard, Ser. &c.

appellee

vs Appeal from Peoria.

The Board of Home Missions &c.

et al

Carnes, J.

This case has been before this court before (Hitchcock v Board of Missions, 173 Ill. App. 67) and before the Supreme Court on appeal from this court (Hitchcock v Bd. of Home Missions 259 Ill. 388) The circuit court had refused to allow solicitor's fees to the Troy Orphan Asylum, appellant here. The said court it had arisen in so doing, and the supreme court affirmed that part of our decision and remanded the cause with directions "to allow the Troy Orphan Asylum a reasonable solicitor's fee." The cause was docketed in the circuit court and referred to the master in chancery "for further proceedings as may be necessary to carry out the judgment and order of the said supreme court and not inconsistent therewith, and that the said master take and hear such proofs as may be necessary to determine the same and report his conclusions of law and fact to this court as soon as may be." Appellant appeared before the master and introduced in evidence the testimony that it had theretofore introduced in relation to solicitor's fees at the former hearing, and offered to prove solicitor's services and the value thereof in the Appellate and the Supreme Court after the entry of the final decree in the circuit court. The master refused to hear proof or consider the value of such services rendered on appeal and found and reported the sum of $1000.00 as a reasonable, and the usual and customary fee for services rendered prior

to the decree in the circuit court, and further found and reported "that under the pleadings in this cause and the order of reference herein" the matter of solicitor's fees in the Appellate and Suppeme Court was not "necessary or proper to be heard or acted upon by him in this cause at this time." Appellant objected and excepted only to that part of the master's report refusing to consider such services in the Appellate and Supreme Court. The chancellor sustained the master's report and entered a decree accordingly, from which this appeal is taken. Appellant says if it was right and just for the Circuit Court to allow solicitor's fees for services rendered in the circuit court, it is certainly equally as right to allow fees for services necessarily rendered on an appeal to the upper court, and cites authorities in support of that position. The Circuit Court could not act in the matter without some pleading on which to base its action. It is not determined in this action whether or not appellant was entitled to allowance forsolicitor's fees for services rendered on appeal. It is onlyheld that there is nothing in the pleadings or the reference presenting that question. Appellant does not refer us to anything in such pleadings or reference raising the question, and so far as we can see the master was right in his conclusion , and the court did not err in sustaining the report.

The decree is affirmed.

in decree in the circuit court, and further found and asserted "that under the pleadings in this cause and the order of reference herein" the matter of solicitor's fees in the Appellate and Supreme Court was "ripe for consideration and to be heard or acted upon by him in this cause at this time." Appellant objected and excepted only to that part of the master's report relating to consider such services in the Appellate and Supreme Court. The chancellor overruled the master's report and "entered a decree accordingly." From which this appeal is taken. Inasmuch also if it was right and just for the circuit court to allow solicitor's fees for services rendered in the circuit court, it is certainly equally as right to allow fees for services in appellate tribunals as appeal to the order court, and also authorizes in support of that position. The circuit court could not in the matter without doing violence to law. In the terms. It is not determined in this office whether or not appellant was entitled to allowance for solicitor's fees for services rendered on appeal. It is only held that there is nothing in the pleadings or the reference presenting that question. Appellant does not refer us to anything in such pleadings or reference relating the question, and so far as we can see the master was right in his conclusion, and the court did not err in sustaining the report.

The decree is affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

Carnes

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6114

Charles H. DeWolfe, appellee

vs Appeal from Stark.

Harlan W. Pierce, et al appellants.

Carnes, J.

Charles H. DeWolfe, the appellee, sued Pierce Brothers, the appellants, for an injury sustained in falling through a hole in the floor of their store building and had a verdict and judgment for $250.00 and costs of suit. Pierce Brothers bring the case here for review and ask a reversal mainly on the ground that there was a variance between the proof and the declaration, and that under the evidence appellee was only a licensee on the premises of appellants, and therefore they did not owe him the duty of reasonable care to keep the premises free from danger.

It appears that appellants were conducting a hardware store and tin shop in the city of Toulon in a building (or two adjoining buildings) having two entrances from the street, One entrance was to the general store room where smaller arricles were kept. That room was kept heated and was the usual place for customers to enter. The other was to a room that appellants call a warehouse, but in which was kept for sale stoves and heavier articles. This room was not kept heated, and the entrance was by means of a sliding door. Back of this room was a tin shop where one of the brothers worked. There was a door from each of the rooms into this tin shop. Before the time in question appellant's customers, desiring to purchase some of the larger articles, or having business in the tin shop, sometimes used the doorway into the so-called warehouse. The evidence fully supports appellee's claim that entrance in this way by customers was with the knowledge of appellants and had been frequent enough to leave

Gen. No. 6114

Charles T. DeWolfe, appellee

vs Appeal from Shark.

Burlen W. Pierce, et al appellants.

Carter, J.

Charles T. DeWolfe, the appellee, and Pierce Brothers, the appellants, for an injury sustained in falling through a hole in the floor of their store building was had a verdict and judgment for $250.00 and costs of suit. Pierce Brothers bring the case here for review and ask a reversal mainly on the ground that there was a variance between the proof and the declaration, and that under the evidence appellee was only a licensee on the premises of appellants, and therefore they did not owe him the duty of reasonable care to keep the premises free from danger.

It appears that appellants were conducting a hardware store and tin shop in the city of Toulon in a building (or two adjoining buildings) having two entrances from the street. One entrance was to the general store room where smaller articles were kept. That room was kept heated and was the usual place for customers to enter. The other was to a room that appellants call a storeroom, but in which was kept for sale stoves and heavier articles. This room was not kept heated, and the entrance was by means of a sliding door. Back of this room was a tin shop where one of the brothers worked. There was a door from each of the rooms into the tin shop. Before the time in question appellant's customers, desiring to purchase some of the larger articles, or having business in the tin shop, sometimes used the doorway into the so-called storeroom. The evidence fully supports appellee's claim that entrance in this way by customers was with the knowledge of appellants and had been frequent among the

no question that customers were invited to make use of that entrance if it suited their convenience or pleasure to do so.

A short time before the accident a drayman in unloading a stove had broken a hole in the floor just back of this sliding door, and appellants had placed a stove over the broken board so that customers entering in that way would not fall in the opening made. On the day of the accident the stove was removed and one of appellants was engaged in repairing the floor. He had removed the stove and gone out of the room for a short time to get something needed in the repair, leaving the sliding door partly open, and while he was gone appellee entering the store stepped in the hole receiving a quite serious injury.

The declaration alleged that there was a hole in the floor of the "store building" and appellants contend that it was not, properly speaking, in the store building, but was in the warehouse, therefore that the case proven was not the one plead. They do not point out where, and we do not discover that they raised this question of variance in the court below, and under the facts above stated we are of the opinion that the room in question was properly denominated a store building.

Appellants cite Gibson v Leonard. 143 Ill. 182, in support of their claim that the owner of the building owes no duty to one on his premises by permission only, except to refrain from wilful or affirmative acts which are injurious. It is no doubt true, as in that case held, that one entering premises by permission only without any enticement, allurement or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls; but the facts of this case do not bring it within ~~the rule~~ that rule of law.

on tradition that customers were invited to make use of that entrance if it suited their convenience or pleasure to do so.

A short time before the accident a workman in unloading a stove had broken a hole in the floor just back of this sliding door, and appellants had placed a stove over the broken board so that customers entering in that way would not fall in the opening made. On the day of the accident the stove was removed and one of appellants was engaged in repairing the floor. He had removed the stove and gone out of the room for a short time to get something needed in the repair, leaving the sliding door partly open, and while he was gone appellee entering the store stepped in the hole receiving a quite serious injury.

The declaration alleged that there was a hole in the floor of the "store building" and appellants contend that it was not, properly speaking, in the store building, but was in some warehouse. Conceding that the case should be decided on that ground, they do not point out where, and we do not discover that they raised this question of variance in the court below, and under the facts above stated we are of the opinion that it was in a sense the property appertaining to a store building.

Appellants cite Wilson v Bonnard, 145 Ill. 182, in support of their claim that the owner of the building owes no duty to one on his premises by permission only, except to refrain from willful or affirmative acts which are injurious. It is no doubt true, as in that case held, that one entering premises by permission only without any enticement, allurement or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstruction s or pitfalls; but the facts of this case do not bring it within the same that rule of law.

There was in this case an implied invitation to use that entrance. Appellee was not a mere licensee, and the case is within the tule announced by this court in Petty v Stebbins 164 Ill App. 439, and cases there cited, and appellants owed appellee the exercise of ordinary care to keep the passage way free from danger.

Appellants contend that the court in its instructions to the jury ignored this question whether appellee was an invitee or mere licensee, and while it is true that in one of the instructions complained of the court did so, yet in another instruction given at the instance of appellants he informed the jury that the plaintiff could not recover unless the evidence showed that the building in which he was injured was a store building kept by the defendants into which the public were invited to enter. We regard the proof so clear and convincing that it was such a building that no error in ignoring that question in another instruction should be held prejudicial to appellants. We think the instructions read, as a whole, are quite as favorable to appellants as they could well ask.

It is argued that appellee was not in the exercise of ordinary care for his own safety. This was a question for the jury, and they were justified by the evidence in reaching the conclusion that he was in the exercise of such care.

It is argued that appellee magnified his injuries and that they were not so serious as testimony introduced by him tended to show. The jury were evidently of that opinion and left no ground for complaint that the verdict is excessive.

Finding no reversible error in the record the judgment is affirmed.

Affirmed.

There was in this case an implied invitation to use that entrance. Appellee was not a mere licensee, and the case is within the rule announced by this court in Petty v Stebbins 184-111 App. 429, as cited by the appellants. Appellee owed appellee the exercise of ordinary care to keep the passage way free from danger.

Appellants contend that the court in its instructions to the jury ignored this question whether appellee was an invitee or mere licensee, and while it is true that in one of the instructions complained of the court did so, yet in another instruction given at the instance of appellants he informed the jury that the plaintiff could not recover unless the evidence showed that the building in which he was injured was a store building kept by the defendants into which the public were invited to enter. We regard the proof so clear and convincing that it was such a building that no error in ignoring that question in another instruction should be held prejudicial to appellants. We think the instructions read, as a whole, are quite as favorable to appellants as they could well ask.

It is argued that appellee was not in the exercise of ordinary care for his own safety. This was a question for the jury, and they were justified by the evidence in reaching the conclusion that he was in the exercise of such care.

It is argued that appellee negligence caused the injuries, and that they were not so serious as testimony introduced by him tended to show. The jury were evidently of that opinion and left no ground for complaint that the verdict is excessive.

Finding no reversible error in the record the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6077

A.L. Carlisle et al appellees.

vs Appeal from Co. Ct. Kane.

John L. Novak, appellant.

Niehaus, J.

This is an appeal from a judgment for $430.20, recovered in the County Court of Kane County, in a suit in assumpsit commenced by the appellants, A. L. Carlisle and C. N. Carlisle co-partners as A. L. Carlisle & Son, real estate brokers, against John L. Novak, appellant; the suit being for commissions claimed by appellees, for selling appellants' farm in Kane County. The main question in the case is one of fact; and calls for the determination of whether the appellees found the purchaser, and brought about the sale of the farm in question, or whether the sale was effectuated and the purchaser found, by the appellant himself.

It appears from the evidence, that about May 16, 1912, the appellant placed the matter of the sale of his farm, in the hands of appellees; and in his letter of that date, made the following proposal to appellees: "I hereby notify you that I am placing my farm in St. Charles, again on the market, and if you care to handle it on the basis of two per sent commision, as we formerly agreed upon, I hereby authorize you to sell the farm for $150. an acre for cash or part cash, and for the balance a mortgage."

The appellee accepted the proposal, and made various efforts to sell, or trade, the farm in question; and finally took the matter up with Mads Mattsen, who was a tenant of appellant on the farm. They first broached the matter of the sale of the farmx to Mattsen, about the first of August, 1912; and commenced active negotiations with him about September 2, 1912; on September 3rd. Mattsen submitted to the appellant,

Con. Ex. 2277

A. L. Cartilale et al. appellees.

vs.

John L. Novak, appellant.

Appeal from St. Ex. Ex.

Dickson, J.

This is an appeal from a judgment for $130.20, recovered in the County Court of Kane County, in a suit in assumpsit commenced by the appellants, A. L. Cartilale and G. M. Cartilale co-partners as A. L. Cartilale & Son, real estate brokers, against John L. Novak, appellant; the suit being for commissions claimed by appellees, for selling appellants' farm in Kane County. The main question in this case is one of fact; and calls for the determination of whether the appellees found the purchaser, and brought about the sale of the farm in question, or whether the sale was effectuated and the purchaser found, by the appellant himself.

It appears from the evidence, that about May 16, 1912, the appellant placed the matter of the sale of his farm, in the hands of appellees; and in his letter of that date, made the following proposal to appellees: "I hereby notify you that I am placing my farm in St. Charles, again on the market, and if you care to handle it on the basis of two per cent commission, as we formerly agreed upon, I hereby authorize you to sell the farm for $150. an acre for cash or part cash, and for the balance a mortgage."

The appellee accepted the proposal, and made various efforts to sell, or trade, the farm in question; and finally took the matter up with Hans Mattsen, who was a tenant of appellant on the farm. They first broached the matter of the sale of the farm to Mattsen, about the first of August, 1912; and commenced active negotiations with him about September 3, 1912; on September 3rd, Mattsen submitted to the appellant,

a statement prepared in the office of appellees, of the terms upon which he would be willing to purchase the farm, which proposal was accepted by appellant, and the farm sold to him.

It is claimed by appellant, that he, himself, procured Mattsen, as a purchaser of his farm; that he had a talk with Matteen at the farm, about September first; that he proposed to Mattsen at that time, to sell him the farm, at $150 per acre; that the price fixed was satisfactory; but that they did not agree upon the terms of payment; that appellant indicated to Mattsen however that he might submit the terms to him, upon which he would be willing to purchase; and that the subsequent submission of terms, and purchase made by Mattsen, were the result of these efforts of his own, with Mattsen, to sell the farm.

On the other hand, it is claimed by appellees, that at the time they took up the matter with Mattsen, he had entirely abandoned the idea of the purchase of the farm, from Novak, and that it was through their efforts, that he was again induced to consider the matter; that they then procured from Mattsen, the proposal of the terms, which were submitted to appellant, and upon which the sale was finally made; and appellees are corroborated in this regard by Mattesen.

The case turns upon the question, as to whether there is a preponderance of the evidence to sustain the claim made by the appellees. The evidence is conflicting in regard to several matters which are material in a determination of that question. The Court, however, saw the witnesses, heard them testify, and was in the best position to judge their credibility in the light of all the circumstances surrounding the transaction; and was best able to determine the weight of the evidence. The Court found that appellees were in the right, in the contentions made; and we cannot say that the court erred in its finding.

prepared in the office of appellees, of the terms upon which he would be willing to purchase the farm, which proposal was accepted by appellant, and the farm sold to him.

It is claimed by appellant, that he, himself, procured Mattson, as a purchaser of his farm; that he had a talk with Mattson at the farm, about September first; that he proposed to Mattson at that time, to sell him the farm, at $130 per acre; that the price fixed was satisfactory; but that they did not agree upon the terms of payment; that appellant suggested to Mattson however that he might submit the terms to him, upon which he would be willing to purchase; and that the subsequent submission of terms, and negotiations made by Mattson, were the result of these efforts of his own, with Mattson, to sell the farm.

On the other hand, it is claimed by appellees, that at the time they took up the matter with Mattson, he had entirely abandoned the idea of the purchase of the farm, from Novak, and that it was through their efforts, that he was again induced to consider the matter; that they then procured from Mattson, the proposal of the terms, which were submitted to appellant, and upon which the sale was finally made; and appellees are corroborated in this regard by Mattson.

The case turns upon the question, as to whether there is a preponderance of the evidence to sustain the claim made by the appellees. The evidence is conflicting in regard to several matters which are material in a determination of that question. The Court, however, saw the witnesses, heard them testify, and was in the best position to judge their credibility in the light of all the circumstances surrounding the transaction; and was best able to determine the weight of the evidence. The Court found that appellees were in the right, in the contentions made; and we cannot say that the court erred in its

Objection also is made by the appellant, to the refusal of a proposition of law, which is as follows: "That the plaintiff did not earn a commission on the sale of the defendant's real estate to Mattsen by ~~his~~ their prior conversations or negotiations, if any, with Mattsen, unless such conversations and negotiations resulted in bringing the defendant and Mattsen into direct negotiations which culminated in a sale."

It is not a correct statement of the law involved, to say, that the appellees did not earn a commission on the sale in question, "unless their prior conversations and negotiations resulted in bringing the appellant and Mattsen into direct negotiations." Appellees claimed, that the negotiations which finally resulted in a sale, were not by Mattsen directly with appellant, but were conducted by them with Mattsen, and that consequent upon the latter negotiations, the terms of payment offered by Mattsen, were determined upon, and then sent to appellant by Mattsen. Moreover, the proposition of law assumes that there were direct negotiations between Mattsen and appellant, which culminated in the sale, which was a contested matter of fact in the case. The proposition of law was therefore, properly refused.

We do not perceive any reversible error in the record, and the judgment should therefore be affirmed.

Affirmed.

Objection also is made by the appellant, to the refusal of a proposition of law, which is as follows: "That the plaintiff did not earn a commission on the sale of the defendant's real estate to Mattson by his prior conversations or negotiations, if any, with Mattson, unless such conversations and negotiations resulted in bringing the plaintiff and Mattson into direct negotiations which culminated in a sale."

It is not a correct statement of the law involved, to say, that the conversations did not earn a commission on the sale in question, "unless such conversations and negotiations resulted in bringing the appellant and Mattson into direct negotiations." It follows, that the negotiations which finally resulted in a sale, were not by Mattson directly with appellant, but were conducted by them with Mattson, and that agreement upon the latter negotiations, the terms of payment offered by Mattson, were interpreted were, and the same was accepted by appellant by Mattson. Moreover, the proposition of law assumes that there were direct negotiations between Mattson and appellant, which culminated in the sale, which was a contested matter of fact in the case. The proposition of law was therefore, properly refused.

We do not perceive any reversible error in the record, and the judgment should therefore be affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6097

William Decker, &c. appellant.

vs Appeal from Peoria.

Albert Braverman, &c. appellee

Niehaus, J.

This is a suit in assumpsit, which was originally brought before a justice of the peace of Peoria County, by the appellant, William Decker, doing business as Montgomery Table Works, against the appellee, Albert Braverman, doing business as Spokane Furniture Co. to recover the invoice prive of manufactured goods, which appellant claims to have sold and delivered to appellee. The amount claimed by appell nt is $150 and interedt from June 30. 1914. The appellee made a tender of $56.70 which was paid into court by appellee.

The controverted matters concern the purchase by the appellee of twelve oak library tables, called "tables in white" which were shipped to the appellee, but which appellee c a ims, were not of the kind and quality purchased by him; and that he, therefore, returned them to the appellant. The case was tried in the circuit court of Peoria County without a jury The only witness called in the case was appellee, and he was called by the appellant. The testimony of appellee, was to the effect, that he gave the order for the "tables in white" to a traveling salesman of ~~appellant~~ Decker; ~~and that the tables which he ordered, were not only~~ to be like certain photographs which the sale sman had displayed to him, ~~but~~ and also, of the grade of oak, and in the kind of wood finish, like a table in appellee's stock; that the grade of wood of the table in appellee's stock, was No. 1 oak; and that the finish of the wood was also of the highest grade.

The tables sent to ~~appellee~~ him, were No. 3 grade of oak;

Gen. No. 6287

William Decker, &c. appellant,

vs. Appeal from Peoria.

Albert Braverman, &c. appellee

Ebenezer, J.

This is a suit in assumpsit, which was originally brought before a justice of the peace of Peoria County, by the appellant, William Decker, doing business as Decker-Perry Table Works, against the appellee, Albert Braverman, doing business as Epoxane Furniture Co. to recover the invoice price of manufactured goods, which appellant claims to have sold and delivered to appellee. The account claimed by appellee is $150 and interest from June 30, 1914. The appellee made a tender of $56.70 which was paid into court by appellee.

The controverted matters concern the purchase by the appellee of twelve oak library tables, called "tables in white" which were shipped to the appellee, but which appellee claims, were not of the kind and quality purchased by him; and that he, therefore, returned them to the appellant. The case was tried in the circuit court of Peoria County without a jury. The only witness called in the case was appellee, and he was called by the appellant. The testimony of appellee, was to the effect, that he gave the order for the "tables in white" to a traveling salesman of Decker-Perry; and that the tables which he ordered, were not only to be like certain photographs which the salesman had displayed to him, but also, of the grade of oak, and in the kind of wood finish, like a table in appellee's stock; that the grade of wood of the table in appellee's stock, was No. 1 oak; and that the finish of the wood was also of the highest grade.

The tables sent to appellee, were No. 3 grade of oak;

and the wood finish was not clear and smoothe like the finish of the table in appellee's stock; but was rough and splintered; and that parts of the tables were very roughly put together;

The appellee's testimony was not contradicted ~~by any one~~; it must, therefore, be taken as a true statement of the contract of sale between the parties, and of the kind and quality of tables which the contract called for. It is clear, from the evidence, that the appellee did not recsive from the appellant the kind and quality of tables called for by the contract of sale; the appellee was, therefore, not bound to accept them, and as a matter of fact, did not accept them; and he should not, therefore, be required to pay for them. (Mayes v Rogers 47 Ill. App. 372; Sparkling v Marks, 86 Ill. 125.)

Appellant contends, however, that the appellee must be presumed to have accepted the tables, because he did not refuse the tables within a reasonable time; and because he twice sent a check for $143.96, to pay for the goods which he purchased, including the tables in question; which checks were not accepted by appellant, however, because they were made out for an amount which was less than the invoice price

As to what is, or is not, a reasonable time, to accept or refuse goods purchased, depends upon the circumstances of each particular case. In this case, it appears from the evidence that the tables when first received by appellee, were stored in his warehouse, because he was not then ready to make use of them; and, that they were in the warehouse about thirty days before he examined them.

We cannot say that the time which elapsed between the date of receiving the goods, and the date of examining them, under the circumstances ~~fax~~ of the case, was unreasonable. Appellee probably had a right to assume, and no doubt did assume, that the goods were of the kind and qualift which he

and the wood finish was not clear and smooths like the finish of the table in appellee's stock; but was rough and splintered; and that parts of the tables were very roughly put together.

The appellee's testimony was not contradicted by any one; it must, therefore, be taken as a true statement of the contract of sale between the parties, and of the kind and quality of tables which the contract called for. It is clear, from the evidence, that the appellee did not receive from the appellant the kind and quality of tables called for by the contract of sale; the appellee was, therefore, not bound to accept them, and as a matter of fact, did not accept them; and he should not, therefore, be required to pay for them. (Mayes v Rogers 47 Ill. App. 174; Overhiser v Burke, 25 Ill. 1[illegible].)

Appellant contends, however, that the appellee must be presumed to have accepted the tables, because he did not refuse the tables within a reasonable time; and because he twice sent a check for $143.06, to pay for the goods which he purchased, including the tables in question; which checks were not accepted by appellant, however, because they were made out for an amount which was less than the invoice price.

As to what is, or is not, a reasonable time, to accept or refuse goods purchased, depends upon the circumstances of each particular case. In this case, it appears from the evidence that the tables when first received by appellee, were stored in his warehouse, because he was not then ready to make use of them; and, that they were in the warehouse about thirty days before he examined them.

We cannot say that the time which elapsed between the date of receiving the goods, and the date of examining them, under the circumstances ~~xx~~ of the case, was unreasonable. Appellee probably had a right to assume, and no doubt did assume, that the goods were of the kind and quality which he

had purchased; and acting on that assumption, naturally would not make haste to examine them. And the checks sent in payment, were forwarded to appellant, before the appellee had examined the tables; it is evident, therefore, that appellee did not, at the time he mailed the checks for payment, have any knowledge of the defects in the quality of the wood and the quality of the finish of the tables; and it cannot be presumed that he intended to waive defects of which he had no knowledge, by this effort to pay for them.

Appellant also contends that appellee had no legal right to return a part, and retain a part, of the goods purchased; that he must either return all, or keep all; but it is well settled, that in a sale of goods, which consist of independent items, of different arti cles, with different prices, each item necessarily constitutes a separate contract. (Rothschild Bros. v Wise, 81 Ill. App. 95; Bank of Antigo v Union Trust Co. 149 Ill. 348; Keeler v Clifford, 165 Ill. 544-7; Siegele v Eaton, 165 Ill. 550)

Furthermore, in this case, the evidence clearly shows, that there was a distinct and separate contract made, with reference to the purchase of the tables in question. There is no reversible error in the matters relied upon by appellant in his brief, for reversal of the judgment.

Appellant declares, that he relies also, for reversal of the judgment, upon all the errors assigned, which includes some not discussed in his brief; we can only consider the errors discussed in appellant's brief: "The general rule and one from which we can see no cause for departing, in this case, is that appellants must abide by the case made in their opening brief. If they do not show a sufficient ground for reversal of the judgment, they can have no ground of complaint if it is affirmed." (People v Hanson et al 150 Ill. 122)

The judgment of the court below should therefore be affirmed. Affirmed.

had purchased; and acting on that assumption, naturally would not take heats to examine them. And the checks sent in payment, were forwarded to appellant, before the appellee had examined the tables; it is evident, therefore, that appellee did not, at the time he sealed the checks for payment, have any knowledge of the defects in the quality of the wood and the quality of the finish of the tables; and it cannot be presumed that he intended to waive defects of which he had no knowledge, by this effort to pay for them.

Appellant also contends that appellee had no legal right to return a part, and retain a part, of the goods purchased; that he must either return all, or keep all; but it is well settled, that in a sale of goods, which consist of independent items, or different sets of goods, with different prices, each item necessarily constitutes a separate contract. (Kozlowski v. Tice, 41 Ill. App. 39; Bank of Antigo v. Union Trust Co. 144 Ill. 248; Kaiser v. Stifford, 147 Ill. 444-7; Sheldon v. Eaton, 185 Ill. 320)

Furthermore, in this case, the evidence clearly shows, that there was a distinct and separate contract made, with reference to the purchase of the tables in question. There is no reversible error in the instructions raised upon by appellant in his brief, for reversal of the judgment.

Appellant contends, that he relies also, for reversal of the judgment, upon all the errors assigned, which include those not discussed in his brief; we can only consider the errors discussed in appellant's brief: "The general rule and one from which we can see no cause for departing, in this case, is that appellants must abide by the case in their opening brief. If they do not show a sufficient ground for reversal of the judgment, they can have no ground of complaint if it is affirmed." (People v. Kanoff et al 194 Ill. 123)

The judgment of the court below should therefore be affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6112.

Jacob Massock, appellee

vs Appeal from Bureau.

Royal Insurance Company, &c.

appellant.

Niehaus, J.

This is a suit in assumpsit, commenced in the circuit court of Bureau County, by the appellee, Jacob Massock, against the Royal Insurance Company, appellant, to recover the amount claimed to be due under the provisions of a fire insurance policy issued by the appellant to the appellee, insuring a store building in Granville, Illinois, against loss by fire, to the amount of $1700.

There was a trial by the court, and the court found the issues for the appellee, and assessed his damages at the full amount of the insurance policy, and interest thereon, making a total sum of $2006.70. Judgment was rendered against the appellant for that amount, and costs of suit; from which judgment this appeal is taken. A reversal of the judgment is asked, on the ground that the appellee did not comply with the provision of the insurance policy, which requires that proofs of loss by fire shall be furnished to the Insurance Company, within 60 days after the loss has occurred; and it is urged, that the failure to comply with this provision of the policy, bars a recovery.

The policy does contain the stipulation, that proofs of loss shall be rendered to the company, within 60 days after the fire, and the liability of the Company is made conditional upon the furnishing of such proofs; this provision however, is one that can be waived by the company, and an agent can waive it for the company. In the case of Citizens Ins. Co. v Stoddard, 99 Ill App. 475, the court in commenting on the

Gen. No. 8112.

Jacob Meacock, appellee

vs. Appeal from Bureau.

Royal Insurance Company, &c.

appellant.

Mileham, J.

This is a suit in assumpsit, commenced in the circuit court of Bureau County, by the appellee, Jacob Meacock, against the Royal Insurance Company, appellant, to recover the amount claimed to be due under the provisions of a fire insurance policy issued by the appellant to the appellee, insuring a store building in Granville, Illinois, against loss by fire, in the amount of $1800.

There was a trial by the court, and the court found the issues for the appellee, and assessed his damages at the full amount of the insurance policy, and interest thereon, making a total sum of $2008.70. Judgment was rendered against the appellant for that amount, and costs of suit; from such judgment this appeal is taken. A reversal of the judgment is asked, on the ground that the appellee did not comply with the provision of the insurance policy, which requires that proofs of loss by fire shall be furnished to the Insurance Company, within 60 days after the loss has occurred; and it is urged, that the failure to comply with this provision of the policy, bars a recovery.

The policy does contain the stipulation, that proofs of loss shall be rendered to the company, within 60 days after the fire, and the liability of the company is made conditional upon the furnishing of such proofs; this provision however, is one that can be waived by the company, and an agent can waive it for the company. In the case of Citizens Ins. Co. v Stoddard, 98 Ill App. 475, the court in commenting on the

point under discussion says:

"We think it must be regarded as the settled rule in this State that such conditions as the one here in question contained in a policy of insurance and providing for steps to be taken after a loss, such as proof of loss, are not within the limitation of another provision of the policy to the effect that no officer, agent or other representative of the company shall have power to waive any provision of the policy except by writing upon, or attached to, the policy. And that an agent, although local in respect to territory, who is empowered to solicit insurance and negotiate contracts therefor, is also empowered as to be able to waive such a condition of the policy as the one ~~xxxxxxx fax xxxx~~ providing for proofs of loss. And that such waiver may be effected by conduct of the agent inconsistent with an intention to enforce a strict compliance of the condition. In this case it appears that Sisson was so far an empowered agent of the appellant that he was authorized to represent it in the soliciting of the insurance in question. The contract of insurance was accomplished through him as representing the appellant. He was therefore empowered to waive the condition as to proofs of loss."

There are a number of cases sustaining this doctrine. (Citizens Ins. Co. v Stoddard, 197 Ill. 330; D. H. Ins. Co. v Dowdall, 159 Ill. 179; Phoenix Ins. Co. v Hart, 149 Ill. 513; E. F. Ins. Co. v W. R. Co. 162 Ill. 322; Hancock Ins. Co. v Schlink 175 Ill. 384; M. & M. Ins. Co. v Schallman, 188 Ill. 213.)

The waiver need not be in express terms, but may be inferred from a course and conduct on the part of the company or its agent, which is calculated to lead the assured to believe that the Company does not require a performance of the condition claimed. (D. H. Ins. Co. v Dowdall, 159 Ill. 179)

point under discussion says:

"We think it must be regarded as the settled rule in this State that such conditions as the one here in question contained in a policy of insurance and providing for steps to be taken after a loss, such as proof of loss, are not within the limitation of another provision of the policy to the effect that no officer, agent or other representative of the company shall have power to waive any provision of the policy except by written consent, or attaches to, the policy. And that an agent, although local in respect to territory, who is empowered to solicit insurance and negotiate contracts therefor, is also empowered so to be able to waive such a condition of the policy as the one mentioned for proofs of loss. And that such waiver may be effected by conduct of the agent inconsistent with an intention to enforce a strict compliance of the condition. In this case it appears that Sisson was so far an empowered agent of the appellant that he was authorized to represent it in the soliciting of the insurance in question. The contract of insurance was accomplished through him as representing the appellant. He was therefore empowered to waive the condition as to proofs of loss."

There are a number of cases following this principle. (Illinois Ins. Co. v Stoddard, 127 Ill. 320; U. N. Ins. Co. v Dowdall, 159 Ill. 179; Phoenix Ins. Co. v Hurt, 142 Ill. 313; N. Y. Ins. Co. v N. R. Co. 158 Ill. 389; Hancock Ins. Co. v Rohlfing 175 Ill. 284; M. & M. Ins. Co. v Schallman, 148 Ill. 413.)

The waiver need not be in express terms, but may be inferred from a course and conduct on the part of the company or its agent, which is calculated to lead the assured to believe that the Company does not require a performance of the condition claimed. (N. N. Ins. Co. v Dowdall, 159 Ill. 179)

In this case the agent of appellant told the appellee, when informed of the fire, that he would send a notice to his company, and that thereupon, the Company would send an adjuster, who would adjust appellee's loss. It was perfectly natural to draw the inference from the statement of appellant's agent, that appellee's loss would be promptly adjusted, without the requirement of the formal proofs of loss, the furnishing of which would necessarily delay such adjustment; and the evidence shows, appellee was led to believe from the conversations he had with the appellant's agent, and the agent's conduct of the business, that the furnishing of formal proofs of loss, would not be insisted upon by the company. The case comes directly within the principle announced in the cases cited. The judgment should, therefore, be affirmed.

Affirmed.

In this case the agent of appellant told the appellee, when informed of the fire, that he would send a notice to his company, and that thereupon, the Company would send an adjuster, who would adjust appellee's loss. It was perfectly natural to draw the inference from the statement of appellant's agent, that appellee's loss would be promptly adjusted, without the requirement of the usual proofs of loss, the furnishing of which would necessarily delay and adjustment; and the evidence above, appellee has let to relate from the conversations he had with the company's agent, and the agent's conduct of the business, that the furnishing of formal proofs of loss, would not be required upon by the company. The case cited, Liberty Mutual Ins. Co. v. Ogle, concerned in the case cited. The judgment should, therefore, be affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6113.

Orr & Lockett Hardware Co.

appellee

vs Appeal from Lake.

Chas. H. Pattison et al

appellants.

Niehaus, J.

~~This is~~ An appeal from the judgment of the circuit court of Lake County, dismissing appellant's appeal, which had been taken from the judgment of a justice of the peace, for appellants' failure to comply with the order of the Court requiring them to file a new appeal bond. It appears from the record, that the appellee recovered a judgment before the justice of the peace, ~~for $200 and costs of suit~~; that ~~appellants took~~ defendants an appealed to the circuit court, and filed with the justice a ~~good and~~ sufficient appeal bond, which the justice accepted and approved; but the bond was lost, or mislaid by the justice; and he therefore failed to return the bond with the other papers, and the transcript, to the clerk of the circuit court ~~to which the appeal had been taken~~ as required by the statute. The only question raised, concerns the power of the court to make the order requiring a new appeal bond to be filed, and dismissing the appeal in consequence of the failure to comply with the order.

The statute requires that the justice shall return the appeal bond to the clerk of the Court to which the appeal is taken, with the other papers in the case, and the transcript of his docket. (Sec. 1, Art. 10, Chap. 79. Revised Statutes) The statute clearly contemplates that the appeal bond shall be on file, with the transcript and the other papers in the case, in the court to which the appeal is taken; and the appeal is not fully completed, until the bond and transcript are filed with the clerk.

Sup. No. 0115.

Eva A Dunwell Dunmore Co.

appellee

vs Appeal from Lake.

Chas. T. Pattison et al

appellants.

Elliott, J.

Pattison appeals from the judgment of the circuit court of Lake County, dismissing appellant's appeal, which had been taken from the judgment of a justice of the peace, for appellants' failure to comply with the order of the court requiring them to file a new appeal bond. It appears from the record, that the appellee recovered a judgment before the justice of the peace, and that appellants took an appeal to the circuit court, and filed with the justice a good and sufficient appeal bond, which the justice accepted and approved; but the bond was lost, or mislaid by the justice; and he therefore failed to return the bond with the other papers, and the transcript, to the clerk of the court to which the appeal had been taken as required by the statute. The only question raised, concerns the power of the court to make the order requiring a new appeal bond to be filed, and dismissing the appeal in consequence of the failure to comply with the order.

The statute requires that the justice shall return the appeal bond to the clerk of the Court to which the appeal is taken, with the other papers in the case, and the transcript of his docket. (Sec. 1, Act. 12, Chap. 70. Revised Statutes) The statute clearly contemplates that the appeal bond shall be on file, with the transcript and the other papers in the case, in the court to which the appeal is taken; and the appeal is not fully completed, until the bond and transcript are filed

"The perfecting the appeal, in such case, is the filing of the bond with the justice of the peace, and the filing of the papers and transcript of judgment ten days before the commencement of the term to which the appeal is taken, with the clerk of that court." (Vallens v Hopkins, 157 Ill. 271)

There can be no doubt about the power of the court to enforce a compliance with the requirements of the Statute on appeals from Justices of the Peace. (Enright v Rehbach, 133 Ill. App. 53; Smith v Davis, 89 Ill. 203; Wood v Tucker, 66 Ill. 276.)

Inasmuch as the original appeal bond could not be filed, it seems reasonable and proper to require that a new bond be filed to take its place. It was the duty of appellants to comply with this order of the Court, and having failed to do so, the appeal was properly dismissed. The judgment is affirmed.

Affirmed.

"The perfecting the appeal, in such case, is the filing of the bond with the justice of the peace, and the filing of the papers and transcript of judgment ten days before the commencement of the term to which the appeal is taken, with the clerk of that court." (Wallace v Hopkins, 157 Ill. 371)

There can be no doubt about the power of the court to enforce a compliance with the requirements of the Statute on appeals from Justices of the Peace. (Enright v Robbson, 152 Ill. App. 52; Smith v Davis, 92 Ill. 202; Wood v Tucker, 88 Ill. 276.)

Inasmuch as the original appeal bond could not be filed, it seems reasonable and proper in legal sense that bond be filed to take its place. It was the duty of appellants to comply with this order of the Court, and having failed to do so, the appeal was properly dismissed. The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

6119

1169

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

196 I.A. 398

Nielsen

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

R H Dunn
Dec 8/15

AT A TERM OF THE APPELLATE COURT,

held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, and for the Second District of the State of Illinois:

PRESENT: HON. CHARLES ALLEN, Presiding Justice.

HON. DWANE L. CARNES, Justice.

HON. JOHN M. DIERKAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

A. M. DAVIS, Sheriff.

IT REMEMBERED, that afterwards, towit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, towit:

Gen. No. 6119.

Katherine Dyer, appellee

vs Appeal from Peoria.

Jacob Weinstein, appellant.

Niehaus, J.

This is a replevin case, originally brought before a justice of the peace, in Peoria County, by the appellee, to recover a diamond ring from Jacob Weinstein, the appellant. The value of the ring was fixed in the affidavit made by appellee, at $75.00. The ring was not obtained by the writ, so recovery for the value thereof was sought under the ~~xxxx~~ count in trover.

It appears from the evidence that the ring in question was the property of appellee, who is a prostitute; and that her paramour Harold Gosnell, placed the ring in pawn with appellant. The evidence is conclusive on the fact claimed by appellant, that the ring was pawned. But it is insisted by appellee, that Gosnell had no authority to dispose of the ring.

The evidence of the illicit relation existing between the parties, however, by which the appellee, in a large measure placed at the disposal of her paramour, not only her person, but also her money and property, as well as the conduct of the appellee, with reference to the matter, after the ring had been pawned, clearly indicate that Gosnell disposed of it with her knowledge and consent; the evidence, taken together is conclusive to sustain this view of the case. If the ring was pawned with her knowledge and consent, she had no legal right to replevin it, or sue for the value of it, without first paying, or at least tendering, the amount of money due appellant in redemption from the pawn. It is not claimed that this was done; there is, therefore, no right of recovery

Gen. No. 8112.

Ludwella Tyre, appellee

vs

Appeal from Peoria.

Jacob Weinstein, appellant.

Mitchell, J.

This is a replevin case, originally brought before a justice of the peace, in Peoria County, by the appellee, to recover a diamond ring from Jacob Weinstein, the appellant. The value of the ring was fixed in the affidavit made by appellee, at $75.00. The ring was not obtained by the writ, as recovery for the value thereof was sought under the count in trover.

It appears from the evidence that the ring in question was the property of appellee, who is a prostitute; and that her paramour Harold Gosnell, placed the ring in pawn with appellant. The evidence is conclusive on the fact claimed by appellant, that the ring was pawned. But it is insisted by appellee, that Gosnell had no authority to dispose of the ring.

The evidence of the illicit relation existing between the parties, however, by which the appellee, in a large measure placed at the disposal of her paramour, not only her person, but also her money and property, as well as the conduct of the appellee, with reference to the matter, after the ring had been pawned, clearly indicate that Gosnell disposed of it with her knowledge and consent; the evidence, taken together is conclusive to sustain this view of the case. If the ring was pawned with her knowledge and consent, she had no legal right to replevin it, or sue for the value of it, without first paying, or at least tendering, the amount of money the appellant in redemption from the pawn. It is not claimed that this was done; there is, therefore, no right of recovery

either in replevin or trover.

The judgment should be reversed.

Reversed.

Finding of facts to be embodied in the judgment.

We find that the appellee's ring, which is the subject matter of this suit, was pawned with appellant, with appellee's knowledge and consent; and that she never paid, or tendered, to appellant, the money due in redemption from pawn; and that therefore, there was no cause of action for the recovery of the ring, or its value.

either in replevin or trover.

The judgment should be reversed.

Reversed.

Finding of facts to be embodied in the judgment.

We find that the appellee's ring, which is the subject matter of this suit, was pawned with appellant, with appellee's knowledge and consent; and that she never paid, or tendered, to redeem, the money due in redemption from pawn; and that therefore, there was no cause of action for the recovery of the ring, or its value.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

R H Dunlap Dec 8/15

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

AT A TERM OF THE APPELLATE COURT,

[illegible] Ottawa, on Tuesday, the first day of October,
[illegible] Lord one thousand nine hundred and fifteen,
[illegible] the Honorable [illegible] of Illinois:

[illegible] presiding Justice.

[illegible] Justice.

[illegible] Justice.

[illegible]

[illegible] that afterwards, to-wit: on the 20th day
[illegible] the opinion of the Court was filed in
[illegible] in the words and figures
[illegible]

Gen. No. 6135.

Claire Beitel, appellee.

vs Appeal from Lee.

C. T. Beitel, appellant.

Niehaus, J.

In this case the appellee Claire Beitel, sued the appellant C. T. Beitel, in trespass, in the circuit court of Lee County, for damages on account of an assault, alleged to have been made upon her by the appellant. The declaration alleges, that she was beaten, ill treated and imprisoned. There are three counts in trespass; and a fourth count, in case, is added to the three counts for assault, which alleges that the appellant alienated the affactions of her husband, Lester Beitel, who is appellant's son; and that she thereby "lost, and was deprived of the support, society, assistance and affection of her said husband."

The general issue was pleaded to the three counts in trespass, as well as the fourth count, in case. A trial by jury was had, which resulted in a verdict finding the appellant guilty of assault, and assessing appellee's damages at $500. The appellant, thereupon, made a motion for a new trial, and in arrest of judgment. Both motions were denied by the court, and a judgment was entered on the verdict, for the amount stated; from which judgment an appeal was taken to this court.

It is evident that error was committed in giving to the jury the ninth instruction, concerning the measure of damages, without limiting it to a finding of guilt under the fourth count of the declaration; for without such limitation it in effect told the jury, that if they found the appellant guilty of assault, which they did, they might "award her such damages as they believed from the evidence, she had sustained

Sec. No. 4113.

Clarie Reitel, appellee,

vs Appeal from Lee.

C. T. Reitel, appellant.

Sievers, J.

In this case the appellee Clarie Reitel, sued the appellant C. T. Reitel, in trespass, in the circuit court of Lee County, for damages on account of an assault, alleged to have been made upon her by the appellant. The declaration alleges, that she was beaten, ill treated and imprisoned. There are three counts in trespass; and a fourth count, in ca. is added to the three counts for assault, which alleges that the appellant alienated the affections of her husband, Lester Reitel, who is appellant's son; and that she thereby "lost, and was deprived of the support, society, assistance and affection of her said husband."

The general issue was pleaded to the three counts i trespass, as well as the fourth count, in case. A trial by jury was had, which resulted in a verdict finding the appellant guilty of assault, and assessing appellee's damag at $500. The appellant, thereupon, made a motion for a new trial, and in arrest of judgment. Both motions were denied by the court, and a judgment was entered on the verdict, for the amount stated; from which judgment an appeal was taken to this court.

It is evident that error was committed in giving to the jury the ninth instruction, concerning the measure of damages, without limiting it to a finding of guilt under the fourth count of the declaration; for without such limitation it in effect told the jury, that if they found the appellant guilty of assault, which they did, they might "award her suc damages as they believed from the evidence, she had sustained

in the loss of the comfort, society and friendship of her husband." The loss of the comfort, society and friendship of her husband, was not a proper element for the jury to take into consideration in measuring the damages on the assault charge, of which the defendant was found guilty; and it was, therefore, misleading, and prejudicial to the appellant's rights on the question of the amount of damages for which he was liable.

The judgment must, therefore, be reversed, and the cause remanded for another trial.

Reversed and remanded.

in the loss of the comfort, society and friendship of her husband." The loss of the comfort, society and friendship of her husband, was not a proper element for the jury to take into consideration in assessing the damages on the assault charge, of which the defendant was found guilty and ex[illegible] was, therefore, misleading, and prejudicial to the appellant's rights on the question of the amount of damages for which he was liable.

The judgment must, therefore, be reversed, and the cause remanded for another trial.

Reversed and remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 20th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6068

The People of the State of Illinois.

Defendant in error.

vs Error to DeKalb.

Moses Brown, Plaintiff in error.

Per Curiam:

One of the Judges of this court feels disqualified to act in this cause because he received the verdict of the jury, and it is seriously contended by plaintiff in error that he ~~we~~ erred in receiving such verdict while said plaintiff in error was absent from the court room on bail. The other judges are of opinion that no error was committed in receiving said verdict, but they are divided in opinion whether, on other grounds, the judgment should be affirmed or reversed. The judgment is therefore affirmed by operation of law, upon the principles stated in Binder v Langhorst, 139 Ill. App. 493.

Judgment affirmed.

No. 4030

The People of the State of Illinois,

Defendant in error.

vs.

Error to Dekalb.

Lease Brown, Plaintiff in error.

Per Curiam:

One of the Judges of this court feels disqualified to act in this cause because he received the verdict of the jury, and it is seriously contended by plaintiff in error that he was asked in receiving such verdict while said plaintiff in error was absent from the court room on bail. The other Judges are of opinion that no error was committed in receiving said verdict, but they are divided in opinion whether, on other grounds, the judgment should be affirmed or reversed. The judgment is therefore affirmed by operation of law, upon the principles stated in Binder v Langhorst. 139 Ill. App. 483.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the ~~20~~ 12th day of October, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6143.

Elizabeth Strickland, Executrix, ~~et al~~

appellees.

vs Appeal from Woodford.

Alexander H. Strickland, et al

appellants.

Opinion Per Curiam:

Elizabeth Strickland in her own right and as executrix of the will of James M. Strickland deceased applied for a construction of the last will of said deceased. The will disposes of both personal and real estate and the main argument here has been upon ~~concerning~~ the question whether certain language of the will ~~construing~~ "chattel property" carried certain moneys in bank and certificates of deposit ~~in bank~~. But the will also gave to Elizabeth all the rest of his property for her use during her natural life and provided that after her death the property remaining should go to four children named, and that if any of said children predeceased the wife the portion of such child should go to the heirs of his or her body and if such child predeceased the wife leaving no living issue, such portion should be divided among the surviving children or the heirs of their ~~body~~ bodies. The bill described not only the personal estate but also the real estate and stated that it was uncertain what interest if any the four children took in the real estate, whether a vested remainder or a contingent remainder and that it was necessary to the proper administration of the estate that the will should be construed so that each heir and legatee may know what interest he or she may have in said estate and the prayer of the bill not only asked for a determination of the interest of the parties in the house hold goods and the certificates of deposit and the cash on hand but also in the real estate.

Gen. No. 5142.

Elizabeth Strickland, Executrix, et al

Appellees.

vs

Appeal from Woodford.

Alexander H. Strickland, et al

Appellants.

Opinion for Court:

Elizabeth Strickland in her own right and as executrix of the will of James H. Strickland presented a petition for a construction of the last will of said deceased. The will disposes of both personal and real estate and the main argument here has been upon the question whether certain bequests of the will constitute "capital property" devised certain money and certificates of deposit. But the will also gave to Elizabeth all the rest of his property for her use during her natural life and provided that after her death the property remaining should go to four children named, and that if any of said children should die without issue the portion of such child should go to the heirs of his or her body and if such child predeceased the wife leaving no living issue, such portion should be divided among the surviving children or the heirs of their issue. The will described not only the personal estate but also the real estate and plainly said it was uncertain what interest if any the four children took in the real estate, whether a vested remainder or a contingent remainder and that it was necessary to the proper administration of the estate that the will should be construed so that each heir and legatee may know what interest he or she may have in said estate and the courts of the will not only asked for a determination of the interest of the testator in the money bonds, and the certificates of deposit but also in the real estate.

The decree not only disposed of the interest in the personal property but also determined how the real estate should be divided after the death of Elizabeth Strickland and provided for the case of any of the children dying before the widow, and determined that the interest so devised to each of the children is a contingent interest.

The fourteenth assignment of error here relates to real estate and the fifteenth assignment of error is that the court erred in its determination how the real estate of the testator passes and how the children took the real estate; and the assignment of error ends by asking that we remand the cause with directions to enter such a decree as not only to dispose of the personal estate but also to determine that Elizabeth Strickland has no interest in the estate except a life use of it. Thus determining that the reference in the fourth clause to "all of the property remaining" does not give the widow any power to sell any of the real estate. We are therefore of opinion that the bill and the decree and the assignments of error raise a question of freehold which we are without legal authority to determine. The cause is therefor directed to be transferred to the Supreme Court under Section 102 of the Practice Act.

Transferred to Supreme Court.

The decree not only disposed of the interest in the personal property but also determined how the real estate should be divided after the death of testator's children and provided for the case of any of the children dying before the widow, and determined what the interest was devised to each of the children is a contingent interest.

The fourteenth assignment of error here relates to real estate and the fifteenth assignment of error is that the court erred in its interpretation of the real estate of the testator passed and how the children took the real estate; and the assignment of error, and by making that, we regard the courts right discretion to enter such a decree as will not only dispose of the personal estate but also to determine that children which are no longer in the private estate a fit use or is, Thus interpreted that the reference in the fourth clause to "all of the property remaining" does not give the widow any power to sell any of the real estate. We are therefore of opinion that the bill and the decree and the assignments of error raise a question of freehold which we are without jurisdiction to determine. The case is therefore directed to be transferred to the Supreme Court under Section 102 of the Practice Act.

Trans. error to Supreme Court.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this ninth day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

6099 1173

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

196 I.A. 403

BE IT REMEMBERED, that afterwards, to-wit: on NOV 5 1915 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6099

Richard Fiedler, appellee.

vs Appeal from Putnam.

Chicago, Indiana & Southerm

Railroad Company, appellant.

Dibell, P. J.

On August 17, 1911, Richard Fiedler owned and occupied a farm near Granville, in Putnam County, which was crossed by the right of way of the Chicago, Indiana & Southern Railroad Company. The right of way across this farm was separated from the farm land by a fence, erected and maintained by the railroad company for many years before the date in question, and at one point in this fence there was a gateway leading to a private crossing over the railroad track. On the day in question a steer belonging to Fiedler was run over and killed by a train of the railroad company and it is claimed by Fiedler that the gate was out of repair; that the blame for its condition rests upon the railroad company; that the steer passed through the gate and upon the right of way, because of the bad condition of the gate; and that the company is liable for the death of the steer.

This suit was originally brought before a justice of the peace, and was taken on appeal to the circuit court of Putnam County, where, upon a jury trial, there was a verdict and a judgment for $85.00 in favor of Fiedler, made up of $60.00 the agreed value of the steer, and $25.00 the agreed value of Fiedler's attorneys fees; from which judgment defendant below prosecutes this appeal. The evidence showed that the gate in question consisted of a steel frame about 14 feet wide and 18 feet long, hung from a post by hinges on one end, and on the other end originally fastened to another post by an iron hook; that the hook had been broken more than a year before the date in question and the gate had been fastened thereafter by wrapping wires around the end

Gen. No. 6096

Richard Tiedler, appellee,

vs. Appeal from Putnam.

Chicago, Indiana & Southern

Railroad Company, appellant.

Dixwell, P. J.

On August 17, 1911, Richard Tiedler owned and occupied a farm near Granville, in Putnam County, which was crossed by the right-of-way of the Chicago, Indiana & Southern Railroad Company. The right of way across this farm was separated from the farm land by a fence, erected and maintained by the railroad company for many years before the date in question, and at one point in this fence there was a gateway leading to a private crossing over the railroad track. On the day in question a steer belonging to Tiedler was run over and killed by a train of the railroad company and it is claimed by Tiedler that the gate was out of repair; that no bars or other obstruction were upon the railroad company; that the steer passed through the gate and upon the right of way. Because of the bad condition of the gate; and that the company is liable for the death of the steer.

This suit was originally brought before a justice of the peace, and was taken on appeal to the circuit court of Putnam County, where, upon a jury trial, there was a verdict and a judgment for $98.00 in favor of Tiedler, made up of $80.00 the agreed value of the steer, and $18.00 the agreed value of Tiedler's attorneys fees; from which judgment defendant below prosecutes this appeal. The evidence shows that the gate in question consisted of a steel frame about 14 feet wide and 18 feet long, hung from a post by hinges on one end, and on the other and originally fastened to another post by an iron hook; that the hook had been broken more than a year before the date in question and the gate had been fastened thereafter by wrapping wires around the and

of the gate and the post and twisting them; that one of the posts by which the gate was fastened had become rotten and that the section men ~~employed by~~ the ~~railroad~~ defendant had not removed the rotten post, but had put in a new post along side of the old one; and that the gate would not reach fromone post to the other. The evidence further showed that, after the killing of the steer, the gate was found open towards the right of way, although the natural way to open it was away from the right of way, and that the wires that had held the gate shut were lying on the ground. ~~It is claimed by appellant that the condition of these wires indicated that they had been unwrapped or unfastened by human agency, probably by hunters who were trespassing on the lands of appellee, and that the gate had been left open by such hunters and the steer thereby got upon the right of way, and that appellant was not liable.~~ There was evidence in the record to the effect that hunters had been seen in the neighborhood on the morning in question, but there was no evidence directly showing that such hunters were on the premises at that time or near this gate, while there was other evidence showing that cattle of appellee had broken through this gate on other occasions and that defendants ~~appellants~~ servants had promised severaltimes to repair this gate in a suitable manner. Appellant claims that the fact that these wires were found on the ground partially untwisted is sufficient to show conclusively that they must have been removed by a human being, but we cannot agree with that claim. If the cattle had actually broken through the gate, as contended by appellee, it would be quite natural that these wires should be found on the ground partially untwisted or unwrapped, as much so as if they had been unwrapped by hand, for the pressure that would cause the gate to open would at the same time unwrap the wires, and the fact that cattle had opened the gate on previous occasions might lead the jury to the conclusion that it had been opened in the same way on the day in question rather than

of the gate and the post and twisting them; that one of the posts by which the gate was fastened had become rotten and that the section men employed by the railroad had not removed the rotten post, but had put in a new post along side of the old one; and that the gate would not reach from one post to another. The evidence further showed that, after the killing of the steer, the gate was found open towards the right of way, although the posts had not be seen it was away from the right of way, and that the wires that had held the gate shut were lying on the ground. It is claimed by appellant that the condition of these wires indicated that they had been unwrapped or unfastened by hands, rather than by hinges, who were trespassing on the lands of appellee, and that the gate had been left open by such hands and the steer wandered upon the right of way, and that appellant was not liable. There is evidence in the record to the effect that a herdsman had been seen in the neighborhood on the morning in question, but there is no evidence directly showing that such hands were on the premises at that time or near this gate, while there was other evidence showing that cattle of appellee had broken through this gate on other occasions and that appellee's servants had repaired several times to repair this gate in a suitable manner. Appellant claims that the fact that these wires were found on the ground partially untwisted is sufficient to show conclusively that they must have been removed by human hands, but we cannot agree with that claim. If the cattle actually broken through the gate, as contended by appellee, it would be quite natural that these wires should be found on the ground partially untwisted or unwrapped, as much so as if they had been unwrapped by hand, for the pressure that would cause the gate to open would at the same time unwrap the wires, and the fact that cattle had opened the gate on previous occasions might lead the jury to the conclusion that it had been opened in the same way on the day in question rather than

that it had been opened by trespassers.

Charles Dysart was a witness for appellee. On cross examination appellant's counsel had him identify a written statement he had made to appellant about a year after the steer was killed. Appellant cross examined Dysart upon the contents of this statement and upon his recollection as refreshed thereby. Thereafter it offered this statement in evidence and the court sustained an objection thereto. It is argued that this ruling was erroneous. The witness, after examining the paper, testified to all the matters of fact appearing therein, and in substantially the same language. and the paper would not have contradicted the witness. The paper contained some matters of opinion which appellant was not entitled to get in evidence in that way. The objection was properly sustained. The other ruling upon evidence of which complaint is made was in refusing to permit a witness for appellant to give an opinion upon a matter which did not require expert evidence, and which the jury were as well qualified to decide as was the witness.

Complaint is made by appellant of the action of the trial court in modifying an instruction requested by it by inserting the words "If proven" which modification appellant claims shifted the birden of proof on certain points from appellee to appellant. The instruction began "if the jury believe from the evidence". This meant the same as "if proven". The insertion of the words "if proven" was a mere unnecessary repetition of what was already expressed. If the instruction put any improper burden upon appellant the appellant requested it, and cannot complain. The instruction as givenonly repeated what appellant requested. No error was committed by that modification. We find no reversible error and the judgment is therefore affirmed.

that it had been signed by Greenstreet.

Charles Jewett was a witness for appellee. On cross examination appellant's counsel had him identify a written statement he had made to appellant about a year after the asset was killed. Appellant never questioned Jewett upon the contents of that statement and upon his redirection is referred exactly. Greenstreet testified this statement in evidence and the court sustained an objection thereto. It is argued that this ruling was erroneous. The witness, after examining the paper, testified to all the material of fact concerning Jewett, and in substantially the same language, and the paper would not have contradicted the witness. The paper contained some matters of opinion which appellant was not entitled to get in evidence in that way. The objection was properly sustained. The other ruling upon evidence of which complaint is made was in refusing to permit a witness for appellant to give an opinion upon a matter which did not require expert evidence, and which the jury were as well qualified to decide as was the witness.

Complaint is made by appellant of the action of the trial court in modifying an instruction requested by it by inserting the words "if proven" which modification appellant claims shifted the burden of proof on certain points from appellee to appellant. The instruction began "if the jury believe from the evidence". This court the same as "if proven". The insertion of the words "if proven" was a mere grammatical expletive, that was already expressed. If the instruction put any improper burden upon appellant the appellant requested it, and cannot complain. The instruction as originally requested what appellant requested. No error was committed by that modification. We find no reversible error and the judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

6121 1/1/7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on NOV 5 1915 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6181

Charles A. Kimmel, appellee

vs Appeal from Peoria.

William A. Gray, appellant.

Mitchell, P. J.

On April 27, 1912, Charles A. Kimmel sued William A. Gray in the Circuit Court of Peoria County in an action at law to recover damages for a breach of a contract, and filed a decleration to which a demurrer was sustained. Thereafter, under Section 40 of the Practice Act, he obtained an order transferring the cause to the chancery side of the docket with leave to file a bill in equity therein against Gray, and to add the names of C C. Dutch and Mexico Development Company as co-defendants. On July 20, 1912 he filed a bill in equity in said cause against said defendants. It set out a written contract between Gray and Kimmel, dated May 26, 1911. It therefrom appeared that there was a suit then pending by Charles A. Kimmel against Charlee D. Dubois, et al, and this contract was for a settlement of ~~said~~ a suit. It was therein agreed that Kimmel should dismiss said suit, and should release Gray from any claims which Kimmel had against him growing out of ~~the selling or trading~~ transactions in of Copper Range Company stock, and should quit claim to Gray and give him the right of possession of certain described real estate, and that Kimmel should assign to Gray a certain judgment Kimmel obtained ~~on December 3, 1910 in the circuit court of Peoria County against Charles D. Dubois, et al for $8,325~~. which judgment Gray should use, if necessary, in a certain matter and, if not so used. then that Gray should re-assign said judgment, or so much thereof as might remain unsatisfied, to Kimmel. Gray therein agreed to organize a corporation ~~to be entitled the Mexico Xxxxxx Copper Mining & Development Company~~, under the laws of Arizona, with a capital stock of $500,000 shares of the par value of $1.00 per share of which 20,000 shares should be delivered to Kimmel, out of 200,000 shares,

[illegible]

[illegible] A. [illegible], appellee

vs

[illegible] Kimmel [illegible].

William A. Gray, appellant.

[illegible], J.

On April 29, 1918, Charles A. Kimmel and William A. Gray in the Circuit Court of Peoria County in an action at law to recover damages for a breach of a contract, had filed a declaration to which a demurrer was sustained. Thereafter, under Section 40 of the Practice Act, he obtained an order transferring the cause to the chancery side of the docket with leave to file a bill in equity wherein against Gray, and to add the name of C. Mack and Peoria Development Company as co-defendants. On July 29, 1921, he filed a bill in equity in said cause against said defendants. It was not a written contract between Gray and Kimmel, dated May 29, 1917. It therefrom appeared that there was a suit then pending by Charles A. Kimmel against Charles D. Lincoln, et al, and the contract was for a settlement of said suit. It was claimed agreed that Kimmel should dismiss said suit, and should release Gray from any claims which Kimmel had against him growing out of the suit. [illegible] Gray and Kimmel, and should quit claim to Gray and give him the right of possession of certain described real estate, and that Kimmel should assign to Gray a certain judgment in favor of Kimmel against Charles D. Lincoln, in the Circuit Court of Peoria County, which judgment Gray should have, if necessary, in a certain suit and, if not so used, then that Gray should re-assign said judgment, or as much thereof as might remain unsatisfied, to Kimmel. Gray thereafter agreed to organize a corporation under the laws of Arizona, with a capital stock of 400,000 shares of the par value of $1.00 per share of which 20,000 shares should be delivered to Kimmel, out of 200,000 shares,

which were to be distributed among certain parties including Gray. By this agreement certain specified mining properties were to be transferred to the company named, and, if said judgment was not used by Gray, then he should reassign the judgment to Kimmel and said 20,000 shares of stock issued to Kimmel should be a settlement in full of the matters described in said contract, but if said judgment was used by Gray for the purposes specified, then Kimmel was to receive 5,000 more shares of said capital stock. Said stock was to be delivered within six months. The contract contained other provisions not material here. The bill averred that Kimmel had performed his part of said contract; that Gray did organize said mining company upon a capitalization of $500,000 divided into 500,000 shares; that Gray afterwards changed the name of said company to Mexico Developement Company, and increased the capital stock to $5,000,000 divided into 5,000,000 shares, without adding anything to the assets of the company, and fraudulently issued to Kimmel only 20,000 shares of said last named capital stock, whereas Kimmel was entitled to 200,000 shares of said last named company besides 50,000 more shares in lieu of the 5,000 shares of the first named company which Kimmel was to receive for the use of the judgment, which judgment it was alleged Gray used and refused to account for and refused to reassign to Kimmel, though requested by Kimmel to do so. The bill further alleged that afterwards, by agreement between said Mexico Development Company and Gray on behalf of Kimmel, 200,000 shares of said last named company were placed in the hands of Charles G.Dutch as trustee to abide the result of the pending suit, and that Dutch holds said stock in trust, subject to the adjustment of the rights of Kimmel and Gray in this litigation; that before the beginning of this suit at law Kimmel demanded said stock of Gray and also demanded that the company withhold delivery to Gray of 200,000 shares of stock to which Kimmel was entitled and that Gray refused the demand.

[illegible] to be distributed among creditor groups including Gray. By this agreement certain identified shares [illegible] were to be delivered to the company [illegible]. If that [illegible] was achieved by Gray, then he should receive the [illegible] to Kimmel and 80,000 shares of stock issued to Kimmel about [illegible] satisfaction in full of the matters described in said [illegible], but at said judgment was used by Gray for the purchase [illegible], then Kimmel was to receive 5,000 more shares of that [illegible]. The [illegible] that Kimmel had delivered within six months. The [illegible] [illegible] other provisions not material here. The [illegible] [illegible] Kimmel and increased his part of said contract; that Gray [illegible] [illegible] company upon a capitalization of 1,000,000 [illegible] 500,000 claimed that Gray afterwards changed the [illegible] of said company to Marine Development Company, [illegible] [illegible] the capital [illegible] 4,000,000 [illegible] without adding anything to the assets of the company, and [illegible] actually issued to Kimmel only 80,000 shares of [illegible] [illegible] initial stock, whereas Kimmel was entitled to 200,000 shares of [illegible] issued company leaving 20,000 more shares in lieu of the 5,000-shares of the first period [illegible] which Kimmel was to receive for the use of the judgment, which judgment [illegible] Gray [illegible] refused to account. The suit referred to resulting in Kimmel, [illegible] requested by Kimmel to [illegible]. The suit further alleged [illegible], by agreement between and Marine Development Company and Gray on behalf of Kimmel, 100,000 shares of [illegible] [illegible] company were placed in the hands of [illegible] [illegible] [illegible] the result of the [illegible] suit, and that Gray [illegible] [illegible] stock in trust, subject to the adjustment of the rights of Kimmel and Gray in this litigation that before the [illegible] of this suit at law Kimmel demanded suit stock of Gray and also demanded that the company without delivery to Gray of 200,000 shares of stock to which Kimmel was entitled and that Gray induced the

The ~~xxxx~~ prayer of the bill, besides an injunction, sought to have 230,000 shares ofsaid stock delivered to Kimmel. The bill was t wice amended. Gray answered, alleging performance and denying Kimmel's construction of the contract. Dutch and the Mexico Development Company filed a joint answer, in which they denied that Dutch held any stock for the use of Kimmel. All the defendants alleged that Kimmel had an adequate remedy at law. The cause was referred to the master to take and report the evidence with his conclusions of law and fact. The master took and reported the evidence and reported that Kimmel had performed his part of the agreement; that Gray had performed his part of the agreement as to the 20,000 shares; that Gray had not used the judgment but had testified that he was ready to re-assign it and that Kimmel was not entitled to any relief on account of said judgment; that said re-organization and increase of capital stock was made with Kimmel's knowledge and without objection by him; that 20,000 shares of the re-organized corporationw was delivered to and accepted by Kimmel, but under a protest and claim that he was entitled to 230,000 additional shares; that this claim by Kimmel had not been established with sufficient definiteness to justify a decree therefor; that Kimmel could have readily purchased upon the market said shares of stock and has a complete remedy at law, and that a court of equity is without jurisdiction; ~~The master also found~~ That after notice from Kimmel the board of directors of the company voted to retain 200,000 shares of the stock owned by Gray to await the outcome of this litigation, and issued said stock to Charles C. Dutch, and that Gray as a director voted for such action, but that this action was taken to protect the company and was not in trust for Kimmel. The master overruled objections by Kimmel to said report and these were renewed as exceptions before the circuit court. The circuit court decreed that Dutch should transfer to Kimmel 180,000 shares of said stock owned by Gray, and that Gray should re-assign said

The main prayer of the bill, besides an injunction, sought to have 80,000 shares stock delivered to Kimmel. The bill was t wice amended. Gray answered, alleging performance and denying Kimmel's complaints of the contract. Dutch and the Mexico Development Company filed a joint answer, in which they denied that Dutch held any stock for the use of Kimmel. All the defendants alleged that Kimmel had an adequate remedy at law. The cause was referred to the master to take and report the evidence with his conclusions of law and fact. The master took and reported the evidence and reported that Kimmel had performed his part of the agreement; that Gray had performed his part of the agreement as to the 80,000 shares; that Gray had not made the judgment but had testified that he was ready to re-assign it and that Kimmel was not entitled to any relief on account of said judgment; that said re-organization and increase of capital stock was made with Kimmel's knowledge and without objection by him; that 80,000 shares of the re-organized corporation was delivered to and accepted by Kimmel, but made a protest and claim that he was entitled to 320,000 additional shares; that this claim by Kimmel had not been established with sufficient definiteness to justify a decree therefor; that Kimmel could have readily purchased upon the market said shares of stock and has a complete remedy at law, and that a court of equity is without jurisdiction. The master also found that after notice from Kimmel the board of dir ectors of the company voted to retain 200,000 shares of the stock owned by Gray to await the outcome of this litigation, and issued said stock to Charles C. Dutch, and that Gray as a director voted for such action, but that this action was taken to protect the company and was not in trust for Kimmel. The master overruled objections by Kimmel to said report and these were renewed as exceptions before the circuit court. The circuit court decreed that Dutch should transfer to Kimmel 180,000 shares of said stock owned by Gray, and that Gray should re-assign said

judgment within ten days, and to that extent sustained the exceptions to the master's report. Gray prosecutes this appeal from that decree.

Appellant contends that Kimmel has a complete remedy at law and therefore that equity has no jurisdiction . Where stock contracted to be sold is not delivered, but is easily obtained in the market, and there is no special reason why the vendee should have the particular stock contracted for, he is left to his action at law for damages; but where its value is not easily ascertainable, or the stock cannot readily be obtained elsewhere or there is some reasonable cause why the vendee should have the particular stock contracted for, equity will compel the vendor to deliver the stock. Hills v McMunn, 232 Ill. 486. This stock has no market value and it has never been listed or offered for sale on the open market. It has no present tangible value. It is only sold by one man who is specially skilled in inducing men with means to buy stock for pure purposes of speculation. If the company can sell enough of the stock in the treasury so as to obtain therefrom sufficient funds to make an adequate roadway to some seaport or railway so as to put the product of the mine into the commerce of the world, and to open the mine and furnish it with adequate machinery , and to begin its operation, and if when the product of the mine is put into the markets of the world it can be sold at a price which furnishes a profit, and if some one of the many revolutions of the present age in Mexico does not result in a confiscation of the mine, then the stock would likely have a market value which could be ascertained, but until all these things have been accomplished it has no value which can be ascertained and fixed by the courts. Therefore Kimmel should be permitted to maintain this suit in equity if the contract entitles him to more stock than he has received. There is another ground of jurisdiction. Kimmel claimed that Gray had made such use of the

[illegible] within ten days, and to that extent sustained the overturns to the market report. They generally speaking from that source.

Equality requires that Kimmel be a complete [illegible] at law and therefore that equity has no jurisdiction. There [illegible] alleged to be sold is not delivered, but is really delivered in the market, and there is no general reason why the vendee should have the particular stock contracted for, he is left to his [illegible] at law for damages; but where its value is not easily ascertainable, or the stock cannot readily be obtained elsewhere or there is some reasonable cause why the vendee should have the particular stock contracted for, equity will compel the vendor to deliver the stock. Mills v Brown, 116 Ill. 444. This stock has no market value and it has never been listed on any [illegible] on the open market. It has no present tangible value. It is only sold by one man who is specially affiliated in interest with those who by which the pure purposes of speculation. If the company can sell enough of the stock it is likely to be worth therefrom sufficient funds to make an adequate monetary [illegible] report or railway or to pay the premium of the mine [illegible] the operation of the mills, and to open the mine and [illegible] it with adequate machinery, and to begin its operation, and if [illegible] the product of the mine is put into the market or [illegible] it can be sold at a price which [illegible] a profit, and if [illegible] of the many revolutions of the present age in Mexico [illegible] result in a confiscation of the mine, then the stock would likely have a market value which would be [illegible], but until these things have been accomplished [illegible] no value which can be ascertained and fixed by the courts. Therefore Kimmel should be permitted to retain the suit in equity in the nominal initial [illegible] to no a stock that has been received. There is nothing [illegible] of jurisdiction. Kimmel claimed that they had made much use of the

judgment referred to that he was entitled to the 5,000 additional shares of stock therefor Gray claimed that he had not used the judgment within the meaning of the contract. Kimmel had a right to resort to equity so as not only to procure a decision of this controverted question, but also to obtain a decree for the re-assignment of the judgment, if Gray's contention that he had not used it should be sustained. Gray's answer that he was ready to re-assign it was not a re-assignment. His testimony that he was ready to re-assign it did not re-invest Kimmel with the title to the judgment. Equity therefore properly took jurisdiction to compel a reassignment of the judgment, if it had not been used by Gray. When equity has jurisdiction , it will proceed to administer all the relief required by the subject matter of the litigation even though part of that relief could have been administered by a court of law.

If Kimmel's theory is correct, still the extent of his rights is incorrectly alleged in the bill and established in the decree. In the original corporation 200,000 shares of stock were taken by stockholders and 300,000 were left in the treasury. The control of the corporation rested entirely with the stock which had been issued. He had 20,000 shares or one-tenth of the active stock. The reason for the increase was two-fold, viz: because it was supposed that treasury stock could be easier sold if the capitalization was large, and to increase the relative amount of treasury stock. Four-fifths of the stock as increased, or $4,000.000 in par value, was to be left in the treasury, and only one-fifth was to go to the original stockholders. If, as Kimmel contends, he was entitled to the same proportion of stock in the new as in the old corporation, it would only be the same proportion of the active stock. The active stock in the new corporation was 1,000,000 shares and one tenth of that would be 100,000 shares. He had already

judgment referred to that he was entitled to the 5,000 additional shares of stock therefor. Gray claimed that he had not used the judgment within the meaning of the contract. Kimmel had a right in reality to equity so as not only to procure a decision of the disagreement question, but also to obtain a decree for the re-assignment of the judgment, if Gray's contention that he had not used it should be sustained. Gray's answer that he was ready to re-assign it was not a re-assignment. His testimony that he was ready to re-assign it did not re-invest Kimmel with the title to the judgment. Equity therefore properly took jurisdiction to compel a reassignment of the judgment, if it had not been used by Gray. When equity has jurisdiction, it will proceed to administer the relief required by the subject matter of the litigation even though part of that relief could have been administered by a court of law.

If Kimmel's theory is correct, still the extent of his rights is incorrectly alleged in the bill and established in the decree. In the original corporation 500,000 shares of stock were taken by stockholders and 500,000 were left in the treasury. The control of the corporation rested entirely with the stock which had been issued. He had 80,000 shares or one-tenth of the active stock. The reason for the increase was two-fold, viz: because it was supposed that treasury stock could be easier sold if the capitalization was large, and to increase the relative amount of treasury stock. Four-fifths of the stock as increased, or 4,000,000 in par value, was to be left in the treasury, and only one-fifth was to go to the original stockholders. If, as Kimmel contends, he was entitled to the same proportion of stock in the new as in the old corporation, it would only be the same proportion of the active stock. The total stock in the new corporation was 5,000,000 shares and one tenth of that would be 500,000 shares. He had already

received 20,000 shares and therefore, if his theory of the case is correct, he would be entitled to but 80,000 shares, instead of the 180,000 decreed to him.

Upon the merits of the case as to the capital stock, we conclude that the evidence does not sustain the claim made by Kimmel inhis bill, and that the arrangement attempted to be proved is too indefinite and uncertain to be enforced by a court of equity. Kimmel testified that when the question whether he would consent to the increased capitalization of the new company was presented to him, he had several ~~xxxxxxxxxxx~~ conversations with Gray and one with Gray and Hall; that he told them he had no objection to the increase, provided his stock was increased pro rata, and they replied that that would have to be considered later; that after the stock had beenincreased Gray of ered him 20,000 shares and Kimmel said he should have more than that and should have his stock increased tenfold, and Gray replied that he was ready to go to Mexico and had no time to adjust the matter of the stock and would take it up later. Hall testified that when Gray left for Mexico, he told Hall to tell Kimmel that he would take care of it when he came back. Gray testified that when he talked with Kimmel about the necessity to increase the capitalization, Kimmel said he had no objection, and that the arrangement was that Kimmel would be treated like all other stockholders and given a proportionate amount; that he and Hall told Kimmel that he would be treated like the rest of the stockholders on the same basis in the new company; that whenhe offered Kimmel his certificate for 20,000 shares in the new company, the latter said he thought he ought to have a little more stock, but after Gray explained everything to Kimmel, the latter took the stock and receipted for it and accepted the 20,000 shares as a settlement, and that Gray did not promise to give Kimmel any more stock or say that he would see about it or settle it later on. The claim of Kimmel in his bill

[illegible] 50,000 shares and therefore, if his theory of the case is correct, he would be entitled to but 20,000 shares, instead of the 100,000 reserved to him.

[illegible] the merits of this case as to the capital stock, we conclude [illegible] the evidence does not sustain the claim made by Kimmel [illegible], and that the agreement attempted to be proved is too indefinite and uncertain to be enforced by a court of equity. Kimmel testified that when the question whether he would continue in the increased capitalization of the new company was presented [illegible] several numerous conversations with Gray and [illegible] Gray and Hall; that he told them he had no objection to the increase, provided his stock was increased pro rata, but they replied that that would have to be considered later; that after the stock had been increased Gray offered his 20,000 shares to Kimmel; he should have more than that and should have his share increased accordingly; and Gray replied that he was ready to do so and had no time to adjust the matter of the stock and would take it up later. Hall testified that when Gray left the office, he told Hall in his presence that he would take care of Kimmel when he came back. Gray testified that when he talked with Kimmel about the necessity to increase the capitalization, Kimmel said he had no objection, and that the arrangement was that Kimmel would be treated like all other stockholders and given a reasonable amount; that he and Hall told Kimmel that he would be treated like the rest of the stockholders on the same basis in the new company; that there [illegible] Kimmel his certificate for 20,000 shares in the new company, the latter said he thought he ought to have a little more stock, but after Gray explained everything to Kimmel, the latter took the stock and receipted for it as matured the 20,000 shares as a settlement, and that Gray did not intend to give Kimmel any more stock, but that he would see about it or settle it later on. The claim of Kimmel in his bill

is that the stock in the original company had never been delivered to him and that when Gray offered him 20,000 shares in the new company, he was offering it in attempted fulfillment of the written contract. The fact is that the books of the old company were made to show Kimmel the owner of 20,000 shares therein and that a certificate therefor in the nameof Kimmel was duly executed by the officers of the old company and taken out of the stock certificate book and handed to Gray to give to Kimmel. It seems that Gray did not actually hand said certificate to Kimmel, but that after the increased capitalization in the new company had beneffected, Gray returned the certificate and caused it to be put back in the old stock book and cancelled. Kimmel acted as a stockholder in the original company after said stock had been made out to him and obviously considered himself as a stockholder therein. We are of theopinion that he was a stockholder in the company originally organized without the manual possession of the stock certificate. It follows that Gray delivered the shares of the original stock which he agreed in the writing to convey and fully performed that contract, except as to the re-assignment of the judgment or delivery of stock if he used it. Aside from the matter of the judgment, the only claim to shares of stock in the new company which Kimmel has must be based upon oral conversations with Gray and Hall. Kimmel did not base his claim in his bill upon such oral conversation s, butupon the written contract. He has no pleading by which he can enforce in this suit any rights conferred upon him by those conversations. Moreover, the arrangement, if any, so orally made, is so uncertain and the proof thereof is so inadequate, that we are of opinion that if properly pleaded it could not be enforced by a court of equity. Seitman v Seitman, 204 Ill 504. It is further to be considered that Kimmel's consent to the increase of the capital stock was not necessary, as he owned but a small fraction thereof, while Gray owned much more than one

is that the stock in the original company had never been delivered to him and that when Gray offered him 20,000 shares in the new company, he was offering it in attempted fulfilment of the written contract. The fact is that the books of the old company were there to show Kimmel the owner of 20,000 shares therein and that a certificate therefor in the manner Kimmel was duly executed by the affiliate of the old company and taken out of the stock certificate book and handed to Gray to give to Kimmel. It seems that Gray did not actually hand said certificate to Kimmel, but that after the approved capitalization in the new company had been effected, Gray returned the certificate and caused it to be put back in the old stock book and cancelled. Kimmel acted as a stockholder in the original company after said stock had been put out in his name and obviously considered himself as a stockholder therein. We are of the opinion that he was a stockholder in the company originally organized without the manual possession of the stock certificate. It follows that Gray delivered the shares of the original stock which he agreed in the writing to convey and fully performed that contract, except as to the re-assignment of the judgment or certificate of stock if he used it. Aside from the matter of the judgment, the only claim to shares of stock in the new company which Kimmel has must be based upon oral conversations with Gray and Hall. Kimmel did not base his claim in his bill upon such oral conversations, but upon the written contract. He has no pleading by which he can enforce in this suit any rights conferred upon him by those conversations. Moreover, the arrangement, if any, so orally made, is so uncertain and the proof thereof is so inadequate, that we are of opinion that if properly pleaded it could not be enforced by a court of equity. Saltman v Saltman, 204 Ill 204. It is further to be considered that Kimmel's consent to the increase of the capital stock was not necessary, as he owned but a small fraction thereof, while Gray owned much more than one

half the actice stock. Again, a part of the evidence as to said oral conversations was to the effect that he was to be treated as the other stockholders were, meaning apparently, the other stockholders except Gray, and those other stockholders were each given and accepted the same number of shares of the new stock which they held of the old. Gray received many more shares of the ~~old~~ new than of the old, but he claimed, and the records of the corporation supported him, that he conveyed certain valuable property rights in consideration for this new and additional stock.

Kimmel contends that Gray did use the judgment in the sense intended by the contract, and therefore he should have additional stock as provided by the contract. Without reciting the evidence on the subject, we think it sufficient to say that we are satisfied that the judgment was not used as contemplated by the written contract, and could not be so used for reasons shown in the evidence, and that therefore the court below properly decreed that Gray should re-assign the judgment.

So far as the decree relates to the judgment, it is affirmed, and in all other respects it is reversed. One third of the costs of this court will be adjudged against Gray and two thirds against Kimmel.

Affirmed in part and reversed in part.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

_____

Clerk of the Appellate Court.

6124

1175

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on NOV 5 1915 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6134.

Chicago & Alton Railroad Company.

appellant.

vs Appeal from Peoria.

Woolner Distilling Company,

appellee.

Carnes, J.

This is one of six suits brought by six railroads against the appellee, Woolner Distilling Company, for demurrage. Two of the suits have before reached this court, and are reported as Distilling Co. v P. & E. Ry. Co. 136 Ill. App. 479, and Chicago P. & St. L. Ry. Co. v Woolner Dis. Co. 160 Ill. App. 192. The present case with four of the others, was referred to a Referee by an order of court ~~on January 28, 1907, reading as follows:-~~ "It is hereby ordered by the court that the parties to the case agreeing ~~xxxxxxxxxxx~~ thereto in open court, that the following issues of fact be submitted to W. L. Ellwood as Referee with power to examine witnesses and ascertain the date of delivery of cars to the defendant, ~~that are~~ claimed to have been detained by defendant and the number of days of detention.

"Also the date of consignment of said cars to defendant and by whom consigned.

Also whether or not there were cars upon which demurrage is claimed, which were not delivered until cars subsequently received by plaintiff, or its delivering road, had been delivered.

The intention of both parties being to have an accounting of the number of days, if any, that cars were detained by defendant with the circumstances of their detention. Said referee to report ~~the evidence taken with his conclusion of fact.~~ "

The referee investigated the matter and made a report to the court based, in part, on evidence introduced before him, and in

Gen. No. 8184.

Michigan & Illinois Railroad Company,

appellant.

vs. Appeal from Peoria.

Woolner Distilling Company,

appellee.

Barnes, J.

This is one of six suits brought by six railroads against the Woolner Distilling Company, for demurrage. Two of the suits have before reached this court, and are reported as Distilling Co. v P. & N. Ry. Co. 124 Ill. App. 472, and Michigan C. & St. L. Ry. Co. v Woolner Dis. Co. 180 Ill. App. 188. The present case with four of the others, was referred to a referee by an order of court in January 1907, [illegible] as follows:- "It is hereby ordered by the court that the parties to the cause appearing herein hereto in open court, that the following issues of fact be submitted to W. L. Ellwood as referee with power to examine witnesses and ascertain the date of delivery of cars to the defendant, that are claimed to have been detained by defendant and the number of days of detention.

"Also the date of consignment of said cars to defendant and by whom consigned.

Also whether or not there were cars upon which demurrage is claimed, which were not delivered until cars subsequently received by plaintiff, or its delivering road, had been delivered.

The intention of both parties being to have an accounting of the number of days, if any, that cars were detained by defendant with the circumstances of their detention. Said referee to report the findings [illegible] "

The referee investigated the matter and made a report to the court based, in part, on evidence introduced before him, and in

part on agreement of parties, including the following finding:- "I further find from the evidence that the defendant detained cars on which plaintiff is entitled to claimdemurrage as set out in "Schedule A", and made a part hereof, the total number of days detention being 2,985 days.

I further findfrom the evidence that the total number of cars for the Woolner Distilling Co. standing each day in the Kickapoo Tracks waiting unloading from March 30, 1904, to March 23, 1905, are as set out in "Schedule B" hereto attached and made a part of this report, the data for Schedule "B" being said "Exhibit 39B"."

There was ahearing before the court on exceptions to the referee's report, which exceptions the court overruled. Then followed a jury trial of this case in which Evidence was introduced by the plaintiff that there was a customary and usual charge for holding cars longer than "free time" of $1.00 a day excluding holidays and Sundays. ~~This evidence was not controverted.~~ Then the plaintiff offered ~~in evidence~~ the referee's report with the shhedules ~~attached to, and~~ made a part of it, ~~for the purpose of~~ showing the amount of time of delay on each of the cars, ~~as shown by each of the schedules~~, and the number of days that the cars in question were detained by the defendant. The defendant objected on the ground that the report is a part of the pleadings in the case, and that the findings of the referee are not proof of the facts in the case, ~~and for various other reasons~~. The court sustained xx the objection, stating as a reason:- "It is conceded by both plaintiff and defendant in this case and statements in open court to the jury were made, both on behalf of the plaintiff as well as the defendant, that there would be no dispute as to the time of shipment of the various cars carrying coal from Springfield and elsewhere to Wesley City or the City of Peoria the time of the

part on agreement of parties, including the following finding:-

"I further find from the evidence that the defendant detained cars on which plaintiff is entitled to claim demurrage as set out in "Schedule A", and made a part hereof, the total number of days detention being [illegible] days.

I further find from the evidence that the total number of cars for the Woolmer Distilling Co. standing each day in the Kingsgate Tracks waiting unloading from March 30, 1924, to March 25, 1926, are as set out in "Schedule B" herein attached and made a part of this award, the data for Schedule "B" being said "Exhibit 107"."

There was absenting before the court on exceptions to the referee's report, which exceptions the court overruled. Then followed a jury trial of this case in which evidence was introduced by the plaintiff that there was a customary and usual charge for holding cars longer than "free time" of $1.00 a day including holidays and Sundays. ~~This evidence was not controverted.~~ The plaintiff offered in evidence the referee's report with the schedules attached to it, and made a part of it, for the purpose of showing the amount of time of delay on each of the cars, as shown by ~~each of the schedules~~, and the number of days that the cars in question were detained by the defendant. The defendant objected on the ground that the report is a part of the pleadings in the case, and that the findings of the referee are not proof of the facts in the case, and for various other reasons. The court sustained as the objection, stating as a reason:- "It is conceded by both plaintiff and defendant in this case and statements in open court to the jury were made, both on behalf of the plaintiff as well as the defendant, that there was no dispute as to the time of arrival of the various cars carrying coal from Springfield and elsewhere to Wesley City or the City of Peoria the time of the

arrival of the cars carrying coal either to Wesley City of Kickapoo Yards in the City of Peoria, or the time the cars were, in fact delivered to the defendant company at its plant at Peoria." Counsel for plaintiff answered, "That while all these matters are admitted to be correctly found by the parties, and acted upon by the parties the matter is not before the jury; that is to say, the result of the investigation and agreement is not before the jury, and the purpose of the preceding offer is to get before the jury those facts." And counsel for defendant replied: "We desire in correction of the statement to say that Exhibit No. "39B" is a part of the evidence in this case, and is now before the court as a part of the Master's report." Then plaintiff's counsel introduced in evidence a schedule that was part of the report and suggested that the heading of the page reading "Time for which plaintiff is entitled to charge demurrage" be eliminated, and defendant's counsel said they would not object to that because it was what they had been agreeing to, and stated that they would agree that Exhibit 39B is a true history of the cars as disclosed by the books of the railroad company, and by the defendants books. Then other schedules and parts of the report were offered separately by the plaintiff, and the court sustained objections to their introduction on the ground that it was not a matter for the jury topass upon. The plaintiff introduced evidence of admissions by the manager of the defendant that there was something due the plaintiff for demurrage charges, and rested, its case. The defendant then offered evidence tending to account for the delay in unloading cars, attributing such delay to the non-action and misconduct of the plaintiff. But we are satisfied that the entire evidence read together, does not admit of the conclusion that there was nothing due from the defendant to the plaintiff on the claims sued on. The verdict was for the defendant, and the court, after overruling a motion for a new trial, entered judgment on the verdict,

from which this appeal is taken.

The reference is said by the parties not to have been under the statute, and it is manifest from the foregoing that there was much confusion in the minds of counsel as to its force and effect. Counsel for appellee seem to have been of the opinion during the trial that it was part of the "pleadings" and therefore part of the record, but on the hearing here they say it is not a part of the record proper but should be shown, if at all, by the bill of exceptions. Appellant's counsel undertake to meet that suggestion by filing here an additional record, supplementing the bill of exceptions. But this additional matter is none of it certified by the judge and there can be no claim that such matter can be got into a record by the certificate of the clerk, as has been here attempted. Submission of common law ~~xxx~~ causes to a referee under different statutes of this state have heretofore been made, and there is some authority to guide the practitioner as to their effect. Little authority is here presented on the question of a reference not under the statute. Such submissions have occurred in other jurisdictions (34 Cyc. 777) and a search of the authorities under that head will no doubt result in establishing some rules to guide in the conduct of a jury trial in part based upon findings of a referee. We are satisfied there is enough properly in the record to show that the plaintiff is entitled to a verdict for some amount, and therefore that the court erred in refusing to grant a new trial.

The action of the court in passing upon the instructions is presented here with some rules of court, as to the submission of instructions, in the additional bill of exceptions, which is not certified by the judge. We therefore cannot consider those questions. For the reasons above indicated the judgment is reversed and the cause remanded.

Reversed and Remanded.

from which this appeal is taken.

The reference is said by the parties not to have been under the statute, and it is manifest from the foregoing that there was much confusion in the minds of counsel as to its force and effect. Counsel for appellee seem to have been of the opinion during the trial that it was part of the "pleadings" and therefore part of the record, but on the hearing here they say it is not a part of the record proper but should be shown, if at all, by the bill of exceptions. Appellant's counsel undertake to cast this supposition by filing here as additional record, supplementing the bill of exceptions. But this additional matter is none of it certified by the judge and there can be no claim that such matter can be got into a record by the certificate of the clerk, as has been here attempted. Submission of common law cases to a referee under different statutes of this state have heretofore been made, and there is some authority to guide the practitioner as to their effect. Little authority is here presented on the question of a reference not under the statute. Such references have occurred in other jurisdictions (34 Cyc. 777) and a search of the authorities under that head will no doubt result in establishing some rules to guide in the conduct of a jury trial in part based upon findings of a referee. We are satisfied there is enough properly in the record to show that the plaintiff is entitled to a verdict for some amount, and therefore that the court erred in refusing to grant a new trial.

The action of the court in passing upon the instructions as presented here with some rules of court, as to the submission of instructions, in the additional bill of exceptions, which is not certified by the judge. We therefore cannot consider these questions. For the reasons above indicated the judgment is reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

6087

1177

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk. 196 I.A. 427

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on NOV 5 1915 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6087.

The First National Bank of

Rock Falls. appellant.

vs Appeal from McHenry.

George Deneen, appellee.

Niehaus, J.

In this case, the appellant, on the 5th. day of April 1912, obtained a judgment for $1602.21, against the appellee, by confession on a narr and cognovit, in the circuit court of McHenry County; and an execution was issued upon the judgment. On the following 15th. day of April, at the same term the appellee, George L. Deneen, filed a motion, supported by an affidavit, to set aside vacate and stay the judgment; and for leave to plead to the declaration ; upon the showing made, which we deem sufficient the court entered an order staying the execution, and giving appellee leave to file pleas to the declaration.

It is claimed by appellant, that it should have had notice of appellee's motion , before an order could legally have been entered, allowing the appellee to plead, and opening up the judgment for that purpose. The power of the court to enter the order, however, does not depend upon notice to appellant. 23 Cyc. 953. There does not appear to be any rule of court requiring the service of formal notice in such cases; and appellant was properly in court, when it appeared for the purpose of having the judgment by confession entered, and was compelled to take notice of all subsequent action on the part of the Court in reference thereto . (Robey v Title Guarantee Etc. Co. 166 Ill. 346; Domestic Building Asso. v Nelson, 172 Ill. 390; Niehoff v People 171 Ill. 343.) And it is apparent that the appellant did take notice of the subsequent proceedings of the court, for it afterward appeared and made a motion to strike the special pleas of appellee from the

Sup. No. 8067.

The First National Bank of
Rock Falls, appellant.

vs. Appeal from Whiteside.

George Dawson, appellee.

Mr. Justice, J.

In this case, the appellant, on the 5th. day of April 1915, obtained a judgment for $1000.00, against the appellee, by confession on a note and cognovit, in the circuit court of Whiteside County; and an execution was issued upon the judgment. On the following 15th. day of April, at the same term the appellee, George L. Dawson, filed a motion, supported by an affidavit, to set aside vacate and stay the judgment; and for leave to plead to the declaration; upon the showing made, which we deem sufficient the court entered an order staying the execution, and giving appellee leave to file pleas to the declaration.

It is claimed by appellant, that it should have had notice of appellee's motion, before an order could legally have been entered, allowing the appellee to plead, and opening up the judgment for that purpose. The power of the court to enter the order, however, does not depend upon notice to appellant. 23 Cyc. 952. There does not appear to be any rule of court requiring the service of formal notice in such cases; and appellant was properly in court, when it appeared for the purpose of having the judgment by confession entered, and was compelled to take notice of all subsequent action on the part of the Court in reference thereto. (Mobey v Title Guarantee Etc. Co. 166 Ill. 546; Domestic Building Asso. v Nelson, 172 Ill. 390; Mikoff v People 171 Ill. 343.)

And it is apparent that the appellant did take notice of the subsequent proceedings of the court, for it afterwards appeared and made a motion to strike the special pleas of appellee from the

files; and to vacate and set aside the order entered, giving to appellee leave to file ~~xhex~~ pleas; and to set aside the order staying the execution. The appellant could raise, and did raise, on this motion, all the questions that it could have raised and urged, and it had formal notice of the motion of appellee for leave to file pleas; and so none of its rights were lost by the lack of a prior notice of appellee's motion.

The principal reason urged for striking ~~xp~~ the appellee's pleas from the files, is that they were not properly verified, by a legally sufficient affidavit of merits, made pursuant to the statute. The statute does not require any verification of the pleas filed, under the circumstances presented in this case. This is not a case where section 55 of the Practice Act applies. That section applies to cases where the plaintiff files with his declaration, an affidavit "showing the nature of his demand and the amount due him from the defendant, after allowing to the defendant all his just credits, deductions and set offs, if any." In this case, the only affidavit filed with the declaration, is the usual one in cases of judgment by confession, verifying the hand-writing and thex genuineness of the signature of the maker of the note upon which the judgment is sought to be taken.

We are of opinion that the motion to strike the pleas from the files, and to set aside the order allowing appellee to plead was properly denied.

The appellant also filed a demurrer to the special pleas; this raised the question of the legal sufficiency of special pleas as a defense to the action the court overruled the demurrer; and appellant elected to stand by its demurrer; whereupon the court ordered that the judgment, which had theretofore been entered by confession , be vacated and set aside, and entered a judgment in bar, on the appellee's special pleas; and this order of the court is assigned for error on this appeal.

filed; and to vacate and set aside the order entered, giving the appellee leave to file special pleas; and to set aside the order staying the execution. The appellant could raise, and did raise, on this motion, all the questions that it could have raised and urged, and it had formal notice of the motion of appellee for leave to file pleas; and so none of its rights were lost by the lack of a prior notice of appellee's motion.

The principal reason urged for striking the appellee's pleas from the files, is that they were not properly verified, by a legally sufficient affidavit of merits, made pursuant to the statute. The statute does not require any verification of the pleas filed, under the circumstances presented in this case. This is not a case where section 55 of the Practice Act applies. That section applies to cases where the plaintiff files with his declaration, an affidavit "showing the nature of his demand and the amount due him from the defendant, after allowing to the defendant all his just credits, indorsements and set offs, if any." In this case, the only affidavit filed with the declaration, is the usual one in cases of judgment by confession, verifying the hand-writing and their genuineness of the signatures of the power of attorney upon which the judgment is sought to be taken.

We are of opinion that the motion to strike the pleas from the files, and to set aside the order allowing appellee to plead was properly denied.

The appellant also filed a demurrer to the special pleas; this raised the question of the legal sufficiency of special pleas as a defense to the action. The court overruled the demurrer; and appellant elected to stand by its demurrer; whereupon the court ordered that the judgment, which had theretofore been entered by nunc pro tunc, be vacated and set aside, and entered a judgment in bar, on the appellee's special pleas; and this order of the court is assigned for error on this appeal.

In determining the question of the propriety of the judgment in bar, upon the special pleas, it is not necessary to find that all the pleas were sufficient in law to constitute a defense, or bar to plaintiff's suit; it is sufficient, if any one of the pleas filed, contains matters which constitute a bar to the action. (The People v Commissioners, 189 Ill. 55; Ward v Stout, 32 Ill. 399) Whatever may be said in reference to the sufficiency of the second third, fourth, fifth and seventh pleas, there is no doubt about the matters alleged in the sixth plea constituting a sufficient and complete defense to appellant's right of recovery upon the note in question. Its demurrer, as a matter of law, admitted that the matters which are set up in the sixth plea, are true; and they had to be so regarded by the court, in passing upon the demurrer.

The court did not err in regarding the matters set out in this plea, as constituting a legal defense to the suit, and therefore properly entered a judgment in bar.

The judgment is affirmed.

Affirmed.

In determining the question of the propriety of the judgment in bar, as to the special pleas, it is not necessary to find that all the pleas were sufficient in law to constitute a defense, or bar to plaintiff's suit; it is sufficient, if any one of the pleas filed, contains matter which constitute a bar to the action. (The People v Commissioners, 129 Ill. 35; Ward v Stout, 32 Ill. 299) Whatever may be said in reference to the sufficiency of the second third, fourth, fifth and seventh pleas, there is no doubt about the matters alleged in the sixth plea constituting a sufficient and complete defense to appellant's right of recovery upon the note in question. The demurrer, as a matter of law, admitted that the matters which are set up in the sixth plea, are true; which they had to be so regarded by the court, in passing upon the demurrer.

The court did not err in regarding the matters set out in this plea, as constituting a legal defense to the suit, therefore properly entered a judgment in bar.

The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

6116

1178

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

196 I.A. 429

Finding of facts modified
R H Denied Dec 8/15

BE IT REMEMBERED, that afterwards, to-wit: on NOV 5 1915 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6116.

R. S. Wall, appellee

vs Appeal from Lake.

Elgin, Joliet & Eastern

Railway Company, appellant.

Niehaus, J.

This is an appeal from a judgment for $3500, recovered in the circuit court of Lake County, by the appellee, R. S. Wall against the appellant, the Elgin, Joliet & Eastern Railway Company, in an action on the case, for damages alleged to have been suffered by the appellee, in consequence of an injury received while in the employ of the appellant as switchman. The declaration alleges, that the appellant is a common carrier; and on the 28th day of March 1914, was engaged in interstate commerce, at Gary Indiana; and that at that time and place, the appellee, while in the appellant's employ as switchman, was at work, as such switchman, in the night time, and in the dark, in switching certain cars which were being used by appellant in carrying interstate commerce; and that atthe time and place in question, he was riding upon a certain car, which was in a broken and defective condition; that this car had been shoved and kicked upon a certain track, and was moving along on said track; and that appellant at the same time caused another car to be shoved and moved toward said moving car, upon which the appellee was then and there riding, at a higher and greater rate of speed; and that the latter car was about to be brought into violent collision with the car upon which the appellee was then and there riding; and that appellee was thereby put in danger of great bodily harm, and was compelled to jump, and did jump, and by so jumping, was injured.

According to the testimony of plaintiff appellee, he was working in appellant's switch yards at Gary, on March 27th. 1914, and was

Cen. Sc. 2123.

R. E. Wall, appellee

vs. Appeal from Lake.

Elgin, Joliet & Eastern

Railway Company, appellant.

Mr. Justice, C.

This is an appeal from a judgment for $5500, recovered in the circuit court of Lake County, by the appellee, R. E. Wall, against the appellant, the Elgin, Joliet & Eastern Railway Company, in an action on the case, for damages alleged to have been suffered by the appellee, in consequence of one injury received while in the employ of the appellant as switchman. The declaration alleges, that the appellant is a common carrier; and on the 28th day of March 1914, was engaged in interstate commerce, as they allege; and that at that time and place, the appellee, while in the appellant's employ as switchman, was at work, in such capacity, in the night time, and in the dark, in switching certain cars which were being used by appellant in carrying interstate commerce; and that at the time and place in question, he was riding upon a metallic car, which was in a broken and defective condition; that this car had been shoved and kicked upon a certain track, and was moving along on said track; and that appellant at the same time caused another car to be shoved and moved toward said moving car, upon which the appellee was then and there riding, at a higher and greater rate of speed; and that the latter car was about to be brought into violent collision with the car upon which the appellee was then and there riding; and that appellee was thereby put in danger of great bodily harm, and was compelled to jump, and did jump, and by so jumping, was injured.

According to the testimony of appellee, he was working in appellant's switch yards at Gary, on March 27th, 1914, and was

engaged in the work of classifying freight trains; ~~that is to say, collecting cars and grouping them together, in station order so that when the cars would be moved in the trains along appellant's railroad, those assigned to the different stations, which were thus grouped together, in consecutive order, might be cut off of the train at the proper place, with the least delay.~~ The work of grouping the cars together is done in the switch yards, and on certain side tracks and stub tracks, and the tracks leading to ~~such side tracks and stub tracks.~~ On the night in question ~~appellee~~ plaintiff was assisting as switchman, in the work of classifying such cars; and while so engaged, was riding on a so-called gondola freight car, that had been kicked onto a track ~~which is numbered 11; and~~ which was called a pocket track; it was his particular business at this time, to stop this car, by setting the brake, and then jump off. The brake was located on a platform in the rear of the car, about on a level with the ~~bottom, or~~ floor of the car, and about four feet from the ground. The brake on the car in question, ~~happened to be~~ was out of order; the gravity dog had dropped out of the ratchet, so that the ratchet would not hold; and it was therefore, necessary for ~~the appellee~~ plaintiff to keep hold of the tightening brake, ~~to slacken the movement of the car,~~ and bring ~~it~~ the car to a stop; and he was thereby ~~detained~~ on the car longer than ~~he would have been,~~ if the brake had been in order; but he had about stopped the movement of the car, and was ready to get off ~~any way,~~ when he noticed another car, about 15 feet away, coming toward the car on which he was riding, and fearing a collision, walked across to the opposite ~~side, which was the north~~ side, and jumped off of the platform to the ground. In jumping off, he struck the ground "stiff legged", thereby causing more jar than would be ordinarily experienced from such a jump. A few minutes after he had jumped, he felt a ticklish pain through his groin, which indicated that he had been ruptured by the jump.

The only apparent effect of the impending collision, on appellee's jumping, was to cause him to jump off on the opposite side; but the ground on that side was just as level, and not any farther from the platform of the car; and there does not appear to have been anything unusual about appellee's jumping off of the platform of the car in question, except that he jumped off "stiff-legged"; and the "stiff-leggedness" of the jump was not caused by the impending collision. There is nothing unusual about cars being bumped together when they are switched around, in the yards. Switchman, in the ordinary and usual course of their employment, would jump off of cars, to avoid the probable effect of such bumping; and in the ordinary course of such employment, it is, obviously nevessary for them to jump off and on cars in motion, and cars standing still; and jumping from a platform like the one in question, and in so close proximity to the ground, must necessarily be a common occurrence in the line of their work in the switch yard; a necessary incident in the ordinary course of a switchman's service. This jumping off was, therefore, an ordinary and usual incident of appellee's employment as switchman; and the risks, dangers and hazards incurred thereby, were the risks and hazards which were assumed by him, because they are incidental to his switching service.

It is well settled, that the risks, hazards and dangers which are ordinary and usual incidents to the employment of a servant, are assumed by him; and that the master is not liable for injuries resulting therefrom. (Cooley on Torts, 521; Woods Law of Master and Servant, Sec. 326; C.& E. I. R. R. Co. v Heeney, 108 Ill. 495. Pullman Car Co. v Laak. 143 Ill. 242; Burke v T. P. & W. Ry. Co. 268 Ill. 614.)

The Federal Liability Law of 1908, which is a basis of appellees suit, does not do away with the right of defense by the master, of the assumption of risk by the servant,in a case of this kind.

The only possible effect of the switching collision, or appellee's jumping, was to cause him to jump off on the opposite side; but the ground on that side was just as level, and not any farther from the platform of the car; and there does not appear to have been anything unusual about appellee's jumping off of the platform of the car in question, except that he jumped off "stiff-legged"; and the "stiff-leggedness" of the jump was not caused by the impending collision. There is nothing unusual about cars being jumped together when they are switched around, in the yards.

Nevertheless, in the ordinary and usual course of their employment, would jump off of cars, to avoid the probable effect of such bumping; and in the ordinary course of such employment, it is, obviously necessary for them to jump off and on cars in motion, and cars everywhere still; and jumping from a platform like the platform, and in so close proximity to the ground, must necessarily be a common occurrence in the line of their work in the switch yard; a necessary incident in the ordinary course of a switchman's service. This jumping off was, therefore, an ordinary and usual incident of appellee's employment as switchman; and the risks, dangers and hazards incurred thereby, were the risks and hazards which were assumed by him, because they are incidental to his switching service.

It is well settled, that the risks, hazards and dangers which are ordinary and usual incidents to the employment of a servant, are assumed by him; and that the master is not liable for injuries resulting therefrom. (Cooley on Torts, 521; Wade law of Master and Servant, Sec. 326; C.& E. I. R. R. Co. v Hewey, 118 Ill. 499. Pullman Car Co. v Lay. 144 Ill. 449; Moore v T. P. & W. R. Co. 288 Ill. 214.)

The Federal Liability Law of 1908, which is a basis of appellees suit, does not do away with the right of defense by the master, of the assumption of risk by the servant, in a case of this kind.

Seaborn Air Line Ry. v Horton, 233U. S. Rep. 492.

We are of opinion therefore, that the risk and dangers involved in jumping off of the car in question, were assumed by appellee in his contract of employment; and that, therefore, there is no liability on the part of appellant, for the injuries sustained by appellee. The judgment should therefore be reversed.

Reversed.

Statement of facts to be incorporated in the judgment.

We find that appellee was not guilty of any negligence which was the proximate cause of the injury to appellee

We further find that the appellee jumped off of a freight car platform situated about 4 feet from the ground, ~~which which had been trying to set a brake~~, in due course of his employment as switchman; that the jumping off of such a platform, was a usual and ordinary incident of his employment as switchman; and that the appellee therefore assumed the risk, hazard and dangers thereof.

Hadgers Air Line Ry. v Horton, 2350, S. Rep. 450.

We are of opinion therefore, that the risk and dangers involved in jumping off of the car in question, were assumed by appellee in his employment of employment; and that, therefore, there is no liability on the part of appellant, for the injuries sustained by appellee. The judgment should therefore be reversed.

Reversed.

~~Statement of issues to be incorporated in the judgment.~~

~~We find that appellee was not guilty of any negligence which was the proximate cause of the injury of appellee.~~

We find that the appellee jumped off of a freight car platform situated about 4 feet from the ground, ~~and that he had been in the employ in such service~~, in the course of his employment as switchman; that the jumping off of such a platform, was a usual and ordinary incident of his employment as switchman; and that the appellee therefore assumed the risk, hazard and dangers thereof.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

_____

Clerk of the Appellate Court.

6156 1181

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on DEC 8 - 1915 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6156.

The People of the State of Illinois.

Defendant in error.

vs Error to Co. Ct. Lake.

Peter Clayton, Plaintiff in error.

Dibell, P. J.

Peter Clayton was adjudged guilty by the county court of Lake County under two counts of an information charging him with keeping open a tippling house on Sunday and was fined $150 under each of said counts and brings the record here for review, and the only error argued is the refusal of the court to grant a new trial for the insufficiency of the evidence to justify a conviction.

Three detectives testified that they bought lager beer at Clayton's dram shop on two successive Sundays prior to the filing of the information and that they were served by one of Clayton's waiters and that they saw several other people drinking there. Clayton testified that he was in his bar room all day both Sundays and did not sell any liquor to any person and only sold ginger ale and soft drinks, and his bartender testified that he did not sell to any one any liquor on either of those Sundays; that no one but himself and Clayton had access to the bar on those days and that what they did sell on those days was "near beer", made by the Pabst Brewing Company of Milwaukee. It is argued that the court and jury should not have believed the three detectives. Our views on that subject are expressed in The People v Sehrer, in which we file an opinion this day.

Judgment affirmed.

Gen. No. 6156.

The People of the State of Illinois,

Defendant in error.

vs. Error to Co. Ct. Lake.

Peter Clayton, Plaintiff in error.

Dissell, P. J.

Peter Clayton was adjudged guilty by the county court of Lake County under two counts of an information charging him with keeping open a tippling house on Sunday and was fined $100 under each of said counts and brings the record here for review, and the only error argued is the refusal of the court to grant a new trial for the insufficiency of the evidence to justify a conviction.

Three detectives testified that they bought lager beer at Clayton's dram shop on two successive Sundays prior to the filing of the information and that they were served by one of Clayton's waiters and that they saw several other people drinking there. Clayton testified that he was in his bar room all day both Sundays and did not sell any liquor to any person and only sold lager ale and soft drinks, and his bartender testified that he did not sell to any one any liquor on either of those Sundays; that no one but himself and Clayton had access to the bar on those days and that what they did sell on those days was "near beer", made by the Pabst Brewing Company of Milwaukee. It is argued that the court and jury should not have believed the three detectives. Our views on that subject are expressed in The People v Sohrer, in which we file an opinion this day.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6-218

1188

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

488

196 I.A.

BE IT REMEMBERED, that afterwards, to-wit: on DEC 8 - 1915 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6218.

John Riley, appellant.

vs Appeal from Will.

John J. Webb, et al appellees.

Per Curiam:

This was a bill in equity by one of the heirs at law of Thomas H. Riley, deceased to contest the ~~xxxx~~ last will Riley died leaving a widow and no descendants. His heirs at law were his brothers and the daughter of a deceased brother.

The will devised real estate to the widow which she would not have taken as an heir at law. It devised real estate to another person who was not an heir at law. It ~~xxxxxxxx~~ bequeathed two annuities to persons who were not heirs at law and made them a charge upon real estate. If the will had been set aside one of the devisees would have taken nothing; the annuities charged upon the real estate would have been defeated and the other devisee would not have taken the interest which the will gives; and the real estate would in part have passed to heirs at law who took nothing under the will.

There was a verdict and a decree sustaining the will and from that decree the appellant appeals to this court. A ffeehold is involved and this court does not have jurisdiction The case will therefore be transferred to the Supreme Court.

Transferred to Supreme Court.

Gen. No. 8318.

John Riley, appellant.

vs Appeal from Will.

John J. Webb, et al appellees.

Per Curiam:

This was a bill in equity by one of the heirs at law of Thomas H. Riley, deceased to contest the ~~will~~ last will Riley died leaving a widow and no descendants. His heirs at law were his brothers and the daughter of a deceased brother.

The will devised real estate to the widow which she would not have taken as an heir at law. It devised real estate to another person who was not an heir at law. It ~~bequeathed~~ bequeathed two annuities to persons who were not heirs at law and made them a charge upon real estate. If the will had been set aside one of the devisees would have taken nothing; the annuities charged upon the real estate would have been defeated and the other devisees would not have taken the interest which the will gives; and the real estate would in part have passed to heirs at law who took nothing under the will.

There was a verdict and a decree sustaining the will and from that decree the appellant appeals to this court. A freehold is involved and this court does not have jurisdiction The case will therefore be transferred to the Supreme Court.

Transferred to Supreme Court.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on DEC 27 1915 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6146.

George W. Black, appellant.

vs Appeal from Winnebago.

George W. Brown, appellee.

Carnes, J.

This suit was begun before a justice of the peace by George W. Black , the appellant, against George W. Brown, the appellee, to recover for work done by appellant on what is claimed to be a public and private road at the request of appellee who was then acting as highway commissioner. On a trial on appeal before the court without a jury, at the close of plaintiff's case, a finding for the defendant was entered, and after overruling a motion for a new trial, the court rendered judgment against the plaintiff for costs, from which this appeal is taken. It appears that there was an attempt some years before to lay out a public and private road for the benefit of appellant, and that afterwards, appellee, as highway commissioner, bargained with appellee to do some work on that road for which he was to be paid by the highway commissioners; that appellant did the work and the commissioners refused payment, and he then sought by this suit to enforce a personal liability of appellee for the amount due him. and while there is some conflict in the testimony, we will assume that appellee did, as a public officer, make a contract with appellant to do the work in question. Appellee denies that the road was ever legally laid out and entablished, and therefore says there could have been no liability on the highway commissioners to repair it, but in our view of the case that is not material here. Assuming that it was work within the province of highway commissioners to hire done and that appellee, as highway commissioners, made a valid contract with appellant to do it, and that appellant did it and is entitled to recover

Gen. No. 8146.

George W. Black, appellant.

vs Appeal from Winnebago.

George W. Brown, appellee.

Carnes, J.

This suit was begun before a justice of the peace by George W. Black, the appellant, against George W. Brown, the appellee, to recover for work done by appellant on what is claimed to be a public and private road at the request of appellee who was then acting as highway commissioner. On a trial on appeal before the court without a jury, at the close of plaintiff's case, a finding for the defendant was entered, and after overruling a motion for a new trial, the court rendered judgment against the plaintiff for costs, from which this appeal is taken. It appears that there was an attempt some years before to lay out a public and private road for the benefit of appellant, and that afterwards, appellee, as highway commissioner, negotiated with appellee to do some work on that road for which he was to be paid by the highway commissioners; that appellant did the work and the commissioners refused payment, and he then sought by this suit to enforce a personal liability of appellee for the amount due him. And while there is some conflict in the testimony, we will assume that appellee did, as a public officer, make a contract with appellant to do the work in question. Appellee denies that the road was ever legally laid out and established, and therefore says there could have been no liability on the highway commissioners to repair it, but in our view of the case that is not material here. Assuming that it was work within the previous of highway commissioners to hire done and that appellee, as highway commissioner, made a valid contract with appellant to do it, and that appellant did it and is entitled to recover

against the highway commissioners as a quasi corporation, still we see no ground for recovery in this action against appellee as an individual. It cannot be claimed that a public officer making a valid and enforceable contract, as such, makes himself personally liable for the payment of the debt incurred. Supposing on the other hand that the contract between appellant and appellee was not valid for the reason that it was one which the highway commissioners were not authorized to make, or one that could not be made by one highway commissioner in the absence of the other two, and therefore appellee, mistaking the law or his duty under it, failed to make a valid contract as a public officer, still he would not be personally liable under the facts in this case. There is no claim that he undertook to bind himself personally, or that appellant supposed he was contracting with appellee as an individual, and if appellee mistook the law and exceeded his ~~ex~~ power as a public officer, appellant is presumed to have known that at the time of the contract, and therefore no personal liability arises. (Mann v Richardson, 66 Ill. 481) The distinction in that respect between the personal responsibility of the agent of an individual and a public agent is pointed out in that case. We are not aware that the authority of that case has ever been questioned in this state, and it seems to be a generally accepted rule of law. (29 Cyc. 1446; Elliott on Roads and Streets, Chap. 28, Sec. 670) There is no question of fraud in this case, and it was stipulated on the hearing that appellant did the business with appellee as a town official. We therefore see no ground on which he can recover. The judgment is affirmed.

Affirmed.

against the Highway commissioners as a quasi corporation, still we see no ground for recovery in this action against appellee as an individual. It cannot be claimed that a public officer making a valid and enforceable contract, as such, makes himself personally liable for the payment of the debt incurred. Supposing on the other hand that the contract between appellant and appellee was not valid for the reason that it was one which the Highway commissioners were not authorized to make, or one that could not be made by one Highway commissioner in the absence of the other two, and therefore appellee, violating the law or his duty under it, failed to make a valid contract as a public officer, still he would not be personally liable under the facts in this case. There is no claim that he undertook to bind himself personally, or that appellant supposed he was contracting with appellee as an individual, and if appellee mistook the law and exceeded his ~~ex~~ power as a public officer, appellant is presumed to have known that at the time of the contract, and therefore no personal liability arises. (Mann v Richardson, 66 Ill. 482) The distinction in that respect between the personal responsibility of the agent of an individual and a public agent is pointed out in that case. We are not aware that the authority of that case has ever been questioned in this state, and it seems to be a generally accepted rule of law. (20 Cyc. 1446; Elliott on Roads and Streets, Chap. 9, Sec. 670) There is no question of fraud in this case, and it was stipulated on the hearing that appellant did sue business with appellee as a town official. We therefore see no ground on which he can recover. The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on DEC 27 1915 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6157

The People of the State of Illinois,

Defendant in error,

vs Error to Co. Ct. Lake.

Edward Fichter, Plaintiff in error.

Carnes, J.

Plaintiff in error Edward Fichter, was one of the proprietors of a dancing pavilion, or hall, in Lake County, in connection with which a bar regularly licensed was conducted and the usual intoxicants sold on week days. It is admitted on some Sundays the place was kept open for the sale of tobacco and soft drinks, including "mar beer". He was, on a jury trial. convicted on a charge of unlawfully keeping open a tippling house on Sunday, and sentenced to pay a fine of $150.00 and sued out this writ of error. He asks a reversal of the judgment on the sole ground that the verdict is not supported by the evidence. The offinse was proven by the testimony of two hired investigators, or detectives, and denied by the defendant himself, corroborated by his bartender and to some extent by another person. It is urged that the detectives, because of their calling and interest in the case, are not to be believed. It is true that the testimony of all witnesses should be heard and weighed with a proper consideration of their character and interest in the matteSr about which they speak. Formerly parties to an action were not permitted to testify because of their interest in the case. Many disqualifications of witnesses have been removed in recent years, and witnesses formerly barred are now heard and the question of the weight of their testimony s left to the jury primarily to determine, subject to the approval of the ttrial court, and of a reviewing court. The testimony of the detectives is to be considered and weighed

Gen. No. 8187

The People of the State of Illinois,

Defendant in error.

vs. Error to Co. Ct. Lake.

Edward Fischer, Plaintiff in error.

Gorman, J.

Plaintiff in error Edward Fischer, was one of the proprietors of a dancing pavilion, or hall, in Lake County, in connection with which a bar regularly licensed was conducted and the usual intoxicants sold on week days. It is admitted on some Sundays the place was kept open for the sale of tobacco and soft drinks, including "near beer". He was, on a jury trial, convicted on a charge of unlawfully keeping open a tippling house on Sunday, and sentenced to pay a fine of $100.00 and sued out this writ of error. He asks a reversal of the judgment on the sole ground that the verdict is not supported by the evidence. The offense was proven by the testimony of two hired investigators, or detectives, and denied by the defendant himself, corroborated by his bartender and to some extent by another person. It is urged that the detectives, because of their calling and interest in the case, are not to be believed. It is true that the testimony of all witnesses should be heard and weighed with a proper consideration of their character and interest in the matters about which they speak. Formerly parties to an action were not permitted to testify because of their interest in the case. Many disqualifications of witnesses have been removed in recent years, and witnesses/generally heard are now heard and the question of the relative weight of their testimony is left to the jury primarily to determine, subject to the approval of the trial court, and of a reviewing court. The testimony of the detectives is to be considered and weighed

like that of other witnesses with a proper consideration, among other things, of the influences under which they were acting. (People v Sohrer, Gen. No. 6155 Ill. App.) The jury and trial court are more likely to judge correctly of the truth or falsity of their statements than is a reviewing court, therefore, as said in People v Conners 246 Ill. 9, their verdict "Will not be set aside unless the finding is so palpably against the weight of the evidence as to indicate that the verdict is based upon passion or prejudice/" The proof for the People was amply sufficient, if believed, to warrant the conviction. The conflicting evidence was for the most part from interested witnesses. We are not disposed to disturb the verdict, sanctioned, as it is, by the judgment of the trial court. The judgment is affirmed.

Affirmed.

like that of other witnesses with a proper consideration, among other things, of the influences under which they were acting. (People v Gomez, 6th. Ed. 2d 111. 4th.) The jury and trial courts are more likely to gain accuracy of the truth by falsity of their statements than in a reviewing court. Therefore, as said in People v Gomez 246 Ill. 9, their verdict "will not be set aside unless the finding is so palpably against the weight of the evidence as to indicate that the verdict is based upon passion or prejudice." The proof for the People was amply sufficient, it believes, to warrant the conviction. The conflicting evidence was for the most part from interested witnesses. We are not disposed to disturb the verdict, sanctioned, as it is, by the judgment of the trial court. The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6092

Christ Kammerer, appellee

vs Appeal from LaSalle.

United States Silica Co.

appellant.

Niehaus, J.

This suit was originally brought before a Justice of the Peace by Christ Kammerer, appellee, against the United States Silica Company, appellant, to recover damages alleged to have been suffered by appellee, on account of the failure of appellant to deliver to him the possession of 44 acres of land, and the dwelling house thereon situated, which he had leased ~~to xxx~~ from appellant. The trial before the Justice resulted in a judgment in favor of appellee, in the sum of $300. An appeal was taken from the judgment, to the circuit court of LaSalle ~~County~~ County, where a trial de novo by jury was had, and a verdict rendered against the appellant, for the sum of $125.00; upon which the court rendered judgment and this appeal was taken therefrom.

It appears from the evidence, that the ~~appellant~~ defendant, on February 26, 1914, leased to the ~~appellee, by a written lease,~~ plaintiff by a written lease the land in question, ~~at a rental of $144 per year, payable in installments of $12, each month, in advance.~~ The term ~~of the lease~~ which was from March 1, 1914 to February 28, 1915. ~~The lease~~ which contained a provision by which the ~~appellant~~ defendant reserved the privilege, at any time to enter the property, for ~~the purposes of extending railroad switch tracks on the same; also for the purpose of mining and shipping silica sand from the premises;~~ and also the further stipulation that ~~appellee~~ plaintiff should not hold the a pellant liable for any damages ~~to himself or his family, animals or crops, which might occur by virtue of the occupation~~ as a result of the occupation of portions of the property by the appellant, ~~in the~~

No. 6082

District Commerce, appellee

vs Appeal from LaSalle.

United States Silica Co.

appellant.

Adams, J.

This suit was originally brought before a Justice of the Peace by Curtis Commerce, appellee, against the United States Silica Company, appellant, to recover damages alleged to have been suffered by appellee, on account of the failure of appellant to deliver to him the possession of 44 acres of land, and the dwelling house thereon situated, which he had leased ~~xx xxx~~ from appellant. The trial before the Justice resulted in a judgment in favor of appellee, in the sum of $[illegible]. An appeal was taken from the judgment, to the circuit court of LaSalle ~~County~~ County, where a trial de novo by jury was had, and a verdict rendered against the appellant, for the sum of $120.00, upon which the court rendered judgment and this appeal was taken therefrom.

It appears from the evidence, that the ~~[illegible]~~ February 26, 1914, leased to the ~~[illegible]~~ the land in question, at a rental of $144 per year, payable in installments of $12, each month, in advance. The term of the lease was from March 1, 1914 to February 28, 1916. The lease contained a provision by which the ~~[illegible]~~ village, at any time to enter the property for the purposes of mining and shipping silica sand from the premises; and also the further stipulation that appellee should not hold the appellant liable for any damages to himself or his family, ~~[illegible]~~ silica of portions of the property by the appellant, in the

for the purposes named. ~~construction and operation of a switch track or in the mining of silica.~~

The land in question, which was situated about two miles from the city of Ottawa, ~~and~~ was known as sand land. and ~~It was upon it a dwelling house, and~~ also could be used for pasture. There was a dwelling house on the land. The ~~appellant~~ defendant after obtaining his ~~release~~ lease from the ~~appellant~~ defendant paid the first installment of rent, and on ~~the date of~~ the commencement of his term ~~March 1st~~. endeavored to take possession of the premises, but found another person ~~by the name of Mr. Erickson~~ in possession. ~~Erickson~~ who claimed that he had a prior lease from the defendant ~~appellant~~, and ~~therefore~~ refused to surrender possession, ~~to appellee. Appellee~~ plaintiff had come there with his household goods and effects, which he wanted to install upon the premises; and being thus prevented from entering ~~upon the occupancy of the same, in accordance with the terms of his lease~~, was forced to rent ~~move into and occupy~~ other premises of a different kind and in a different locality.

If appellant prior to the execution of the lease to the appellee, by oral arrangement with Erickson, leased the premises in controversy to Erickson, for a year, at a rental of $100. as claimed by Erickson; and Erickson was in possession under such leasing, at the time appellee sought to take possession namely March 1, 1914, then the legal, as well as the actual possession at that time, was in Erickson; and the direct effect of this act of prior leasing of the premises, by appellant, precluded appellee from obtaining and enjoying the possession of the premises; which possession appellant had agreed to give him, under the covenant for possession and quiet enjoyment impliedly contained in appellant's lease to appellee.

Whether or not there was an actual leasing to Erickson as testified to by him, and possession taken and held under such leasing were questions of fact, to be passed upon, and

The land in question was situated about two miles from the city of Lynton, and was known as said land, in the pleadings herein, and usually as land for pasture.

After obtaining his release from the appellee, by the first instalment of rent, and on the execution of his note for the balance, amounting to the equal of the premises, but [illegible] leases from [illegible], and [illegible] refused to surrender possession, [illegible] appellee [illegible] come to go with his [illegible] goods and effects, which he wanted to install upon the premises; and being thus prevented from entering upon the possession of the same, in accordance with the terms of his lease, he [illegible] to rent, [illegible] lease of a different kind, and in a different locality.

If appellant prior to the execution of the lease to the appellee, by oral arrangement via Erickson, leased the premises in question to Erickson, for a year, at a rental [illegible] claimed by Erickson; and Erickson was in possession under such leasing, at the time appellee sought to take possession [illegible] March 1, 1914, then the legal, as well as the actual possession at that time, was in Erickson; and the air of right of this act of prior leasing of the premises, by appellant, precluded appellee from obtaining and enjoying the possession of the premises; which possession appellant had agreed to give him, under the covenant for possession and quiet enjoyment [illegible] appellant's [illegible].

Whether or not there was an actual leasing to Erickson as testified to by him, and possession taken and held under such leasing were questions of fact, to be passed upon, and

determined by the jury; and the jury, under the instructions of the court, did determine these questions; and determine them against the contention of appellant. Assuming, that there was a prior leading of the premises, to Erickson, as claimed, and a breach of appellant's covenant for possession and quiet enjoyment, as stated, appellant would be liable in an action of assumpsit. (Berrington v Casey 78 Ill. 317; Green v Williams, 45 Ill. 206.) The rule concerning the measure of damages in this class of cases, is well settled, and limits the right of recovery in general, to the difference between the rental value of the premises involved, and the rent which the lessee actually agreed to pay. (Gazzalo v Chambers, 73 Ill. 75; Berrington v Casey, supra; Green v Williams, supra; Dobbins v Duquid, 65 Ill. 464; Herpolsheimer v Christopher 9 L. R. A. N. S. 1130; Huntington Easy Payment Co. v Parsons, 9 L. R. A. N. S. 1130.) But "the lessee may also recover such special damages as have been directly and necessarily occasioned by the plaintiff's wrongful act and default; but cannot recover what he might have made on the premises during the lease, nor for loss sustained by the selling of his stock, agricultural implements, and so forth, for less than their value." (Huntington Easy Payment Co. v Parsons, supra; Dobbins v Duquid, 65 Ill. 464.)

The record discloses, that evidence of the rental value of the land in question was introduced on the part of the appellee on the trial, without taking into consideration the reserved rights of appellant, to enter upon the land leased, for the purpose of extending switch tracks, and mining silica; nor the exemption of appellant from liability for damages; these were substantial factors, which necessarily entered into a correct estimate of the rental value of the land, as leased, and should

determined by the jury; and the jury, under the instructions of the court, did determine these questions; and determine them against the contention of appellant. Assuming, that there was a prior leasing of the premises, to Erickson, as claimed, and a breach of appellant's covenant for possession and quiet enjoyment, as claimed, appellant would be liable in an action of assumpsit. (Partington v Cooey 73 Ill. 317; Brown v Tilline, 45 Ill. 344.) The rule governing the measure of damages in this class of cases, is well settled, and limits the right of recovery in general, to the difference between the rental value of the premises involved, and the rent which the lessee actually agreed to pay. (Sparrow v Chamberlain, 73 Ill. 75; Partington v Cooey, supra; Green v Williams, supra; Dobbins v Dugald, 65 Ill. 464; Hertzelsheimer v Christopher 9 L. T. R. N. S. 1130; Mentzgen Tay Supreme Co. v Bateman, 3 L. R. A. N. S. 1130.) But "the lessee may also recover such special damages as have been directly and immediately occasioned by the plaintiff's wrongful act and default; but cannot recover what he might have made on the premises during the lease, nor for loss sustained by the selling of his stock, agricultural implements, and so forth, for less than their value." (Mentzgen Gay Supreme Co. v Bateman, supra; Sparrow v Chamberlain, 73 Ill. 75.)

The record discloses, that evidence of the rental value of the land in question was introduced on the part of the appellee on the trial, without taking into consideration the reserved rights of appellant, to enter upon the land leased, for the purpose of extending switch tracks, and mining silica; nor the exception which gives them liability for damages upon substantial factors, which necessarily entered into a correct estimate of the rental value of the land, as leased, and should

have been incorporated in the interrogatories concerning such rental value. It was also error to permit evidence to go to the jury, of rental value of the dwelling house situated on the premises, separate from the land. The house was a part of the land; and could not be used without also using the land upon which it is located. It could not have a rental value separate from the land; and its value should have been considered only in connection with, and as a part of, the land leased.

There was but one instruction given for the plaintiff; and it is as follows: "The court instructs the jury, as a matter of law, that if you believe from all the evidence in the case that plaintiff in this suit had leased certain property from the defendant, and that before or after the lease was made the said defendant leased the said property to another and put such other in possession, whereby it was impossible for plaintiff to obtain possession of the property, and that because thereof plaintiff was damaged, then and in that instance your verdict should be for the plaintiff, in such damage as it is proved under the instructions in this case he has suffered."

This instruction told the jury that if they found for the plaintiff, "they should find such damages as is proved under the instructions in this case, he has suffered", and did not give them the correct measure of damages. No other instruction was given concerning the matter; and the jury were without a proper guide, in that regard. It was important and necessary that the jury should have been correctly instructed in the case as to how the damages should be ascertained; and since no instruction given laid down the measure of damages, it was error to give the instruction above set out. (Waldron v Warcier 82 Ill. 550; Keightlinger v Egan, 65 Ill. 235; City of Freeport

rental value. It was also error to permit evidence to go to the jury, of rental value of the dwelling house situated on the premises, separate from the land. The house was a part of the land; and could not be used without also using the land upon which it is located. It could not have a rental value separate from the land; and its value should have been considered only in connection with, and as a part of, the land leased.

There was but one instruction given for the plaintiff; and it is as follows: "The court instructs the jury, as a matter of law, that if you believe from all the evidence in the case that plaintiff in this suit had leased certain property from the defendant, and that before or after the lease was made the said defendant leased the said property to another and such other in possession, whereby it was impossible for plaintiff to obtain possession of the property, and that because thereof plaintiff was damaged, then and in that instance your verdict should be for the plaintiff, in such damage as it is proved under the instructions in this case he has suffered."

This instruction told the jury that if they found for the plaintiff, "they should find such damages as is proved under the instructions in this case, to be sufficient", and did not give them the correct measure of damages. No other instruction was given concerning the matter but the jury were without a proper guide, in that regard. It was important and necessary that the jury should have been correctly instructed in the case as to how the damages should be ascertained; and since no instruction given had shown the measure of damages, it was error to give the instruction above set out. (Pulliam v Murphy 82 Ill. 550; Keightlinger v Egan, 85 Ill. 326; City of Freeport

v Isbell, 83 Ill. 440; C. C. C. & St. L. Ry. Co. v Jenkins, 174 Ill. 398; Chicago City Ry. Co. v Mead, 206 Ill. 174; Muren Coal & Ice Co. v Newell, 204 Ill. 515; LaPorte v Wallace, 80 Ill. App. 517.

For the reasons xxxx stated the judgment should be reversed, and the cause remanded for another trial.

Reversed and remanded.

v Indell, 62 Ill. 447; C. C. C. & St. L. Ry. Co. v Jenkins, 174 Ill. 398; Chicago City Ry. Co. v Mead, 208 Ill. 174; Burton Coal & Ice Co. v Powell, 204 Ill. 215; Lafayette v Coleman, 20 Ill. App. 217.

For the reasons stated the judgment should be reversed, and the cause remanded for another trial.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

Opinion filed May 24, 1915

(196)

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of ~~March~~ October in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of ~~March~~ October, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, ~~Presiding~~ Justice.
Hon. James C. McBride, Presiding Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff*

And afterwards ~~in Vacation, after said March term~~, to-wit: On the 9th day of ~~July~~ November A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following: (March term 1914)

Dailey et al

vs.

No. 41

March Term, 1914.

Bonnell

196 I.A. 530

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Massac COUNTY

TRIAL JUDGE

Hon. Wm W. Clemens

Term No. 41. Agenda No. 26.

March Term, A. D. 1914.

Ernest Smiley, Perry Smiley and Opal Smiley, by their next friend Nora Smiley, Appellees, vs. Willard Barnes, Appellant.	Appeal from the Circuit Court of Massac County.

McBride, J.

The plaintiffs recovered a judgment in the Circuit Court for three thousand dollars, and the defendant prosecutes this appeal.

It appears from the evidence in this case that Gill Smiley, father of appellees, was a farmer living near Brookport ~~and was the owner of 200 acres of land which he purchased some two years ago, had paid about one-half of the purchase price and was indebted thereon to the amount of about two thousand dollars.~~ That on September 27, 1912, he hauled a wagon load of railroad ties to Brookport and sold them and that after the making of the sale he visited defendant's ~~appellant's~~ saloon in Brookport and purchased a drink of whiskey. Thereafter he drank four drinks of whiskey and some beer at defendant's ~~appellant's~~ saloon and purchased a half a pint of whiskey that he took away with him, and that by three or four o'clock he was intoxicated and started home riding upon the running gears of his wagon. After he was ~~starting home~~ he drank more liquor from the half pint purchased and became very badly intoxicated and drove his team at times at a very rapid gait. He had not gone far ~~more than two or three miles~~ from Brookport before he fell from his wagon but again recovered

March Term, A. D. 1914.

Ernest Bailey, Perry Bailey and Opal Bailey, by their next friend Nora Bailey, Appellees, vs. William Barnes, Appellant.	Appeal from the Circuit Court of Greene County.

Parke, J.

The plaintiffs recovered a judgment in the Circuit Court for three thousand dollars, and the defendant prosecutes this appeal.

It appears from the evidence in this case that William Bailey, father of appellees, was a farmer living near Brookport and was the owner of 200 acres of land which he purchased some years ago, but paid about one-half of the purchase price and was indebted thereon to the amount of about two thousand dollars. That on September 27, 1913, he hauled a wagon load of railroad ties to Brookport and sold them and that after the selling of the ties he visited appellant's saloon in Brookport and purchased a drink of whiskey. Thereafter he drank four drinks of whiskey and some beer at appellant's saloon and purchased a half a pint of whiskey that he took away with him, and that by three or four o'clock he was intoxicated and started home riding upon the running gears of his wagon. After getting home he drank more liquor from the half pint purchased and became very badly intoxicated and drove his team at times at a very rapid gait. He had not gone more than two or three miles from Brookport before he fell from his wagon but again recovered

his place and after having driven a short distance further he again fell and at this time his legs caught over the bounds of the wagon, with his head and shoulders dragging on the ground, in which position he was ~~dragged~~ drag ged the distance of about ten feet, ~~and was in fact,~~ fully at this time, ~~very badly~~ purely intoxicated. He was carried to one side of the road. ~~where he remained during the entire night.~~ About ten o'clock at night a Mr. Edwards discovered him and tried to get him up but Smiley made ~~as much~~ complaint of pain on being handled that Edwards threw his coat over him and left him alone, and he remained there all night. The next morning Smiley was carried, ~~by two men,~~ to the home of Edwards, ~~about two hundred yards distant from where he had lain during the night.~~ He was cold and sick and could not eat and in a short time his leg began to swell and he began vomiting, which ~~vomiting and straining was kept up~~ continued until his death. There was no outward appearance of injury to the leg which had swollen very badly. His bowels and kidneys were apparently so paralyzed ~~that they were unable to secure an~~ that no operation from his bowels, and his urine in small quantities had to be removed by the use of a catheter. Purgatives were ~~prescribed and~~ used for the bowels but without ~~success~~ effect. Different doctors visited him but it seems that none of them were able to give him relief. On October 7th Smiley was taken with a bleeding at the nose, which was treated by his physician who ~~returned again~~ on October 9th ~~and~~ found the hemorrhage of the nose very profuse and the vomiting almost constant. He plugged the posterior area with adrenlin gauze but was unable to stop the hemorrhage and Smiley died on the morning of October 10th. There is no evidence or claim of Smiley having drank or procured the liquor at any other place than the saloon of the appellant, and in fact there is no dispute but that the

his place and after having driven a short distance further he again fell and at this time his legs caught over the handle of the wagon, with his head and shoulders dragging on the ground, in which position he was dragged the distance of about ten feet, and was killed, at this time, being badly lacerated. He was carried to one side of the road. [illegible] the entire night. About ten o'clock on night of Mr. Dawson discovered him and tried to get him up but finding such an complaint of pain he being handled that Dawson leaves him and over him and left him alone. The next morning Dawson was arrested, by two men, in the house of Johnson, about two hundred yards distant from where he had lain during the night. He was told and also said he could not and in a short time his leg began to swell and he began vomiting, which vomiting continued for one hour to until his death. There was no outward appearance of injury to the leg which had swollen very badly. His bowels and kidneys were apparently so lacerated that they were unable to retain or expel nourishment from his bowels, and his kidneys in small quantities had to be removed by the use of a catheter. Surgeries were recommended and used for his bowels but without success. Witnesses examined this day it seems that some of them were able to give his action. Dr Graham Thompson was called with a bleeding at the nose, which was stopped by the physician who returned again on October 8th and found the hemorrhage of the nose very profuse and the vomiting almost constant. He plugged the posterior nares with absorbent cotton was unable to stop the hemorrhage and Dawley died on the morning of October 10th. There is no evidence or claim of Dawley having drank or procured the liquor at any other place than the saloon of the appellant, and in fact there is no dispute but that the

liquors were procured at appellant's saloon, that he became very badly intoxicated; that the vomiting and retching and paralysis of the bowels and kidneys continued from that day until his death. It also appears from the evidence that deceased was of the age of about thirty-four years and not in the habit of excessive intoxicated; that he was a healthy able-bodied man, excepting a deafness which had been caused many years ago by cerebro meningitis, and was an active, energetic and reasonably prosperous farmer.

The declaration in this case consisted of four counts. The first three counts alleging, in substance, that on October 10, 1912, appellees were the minor children of one Will G. Smiley; that the said Will G. Smiley was a farmer and derived from his business an annual income of about two thousand dollars, by means of which he maintained and supported appellees in a liberal manner. That appellant was engaged in the business of selling intoxicating liquors in the town of Brookport and sold and gave Will Smiley intoxicating liquors that caused him to become intoxicated and that while so intoxicated he fell from the wagon and sustained injuries to his person from which he lingered several days and then died as the result of said injuries, and that by reason of the death of the said Will G. Smiley, appellees were injured in their means of support.

The fourth count of the declaration charges that Will G. Smiley derived an income of about three thousand dollars annually from his farm and stock raising and that on the 27th of September, 1912, he purchased intoxicating liquors from the appellant which caused him to become intoxicated and that in consequence of such intoxication the said Will G. Smiley sickened and languished and languishing did live until the 10th of October when he died in consequence of such intoxication and

liquors were procured at appellant's saloon, that he became very badly intoxicated; that the vomiting and retching and paralysis of the bowels and stomach continued from that day until his death. It also appears from the evidence that deceased was of the age of about thirty-four years; that he was a healthy able-bodied man, enjoying a business which had been a used many years ago by cerebro meningitis, and was an active, energetic and reasonably prosperous farmer.

The deceased in life came provided of four sons. The first three sons claiming, in substance, that on October 10, 1912, appellee was the sole guardian of one Will E. Bailey; that the said Will E. Bailey was a farmer and derived from his business an annual income of about two thousand dollars, by reason of which he maintained and supported appellee in a liberal manner. That appellant was engaged in the business of selling intoxicating liquors in the town of Brookport and said and gave Will Bailey intoxicating liquors that caused him to become intoxicated and that while so intoxicated he fell from the wagon and sustained injuries to his person from which he lingered several days and then died as the result of said injuries, and that by reason of the death of the said Will E. Bailey, appellee was injured in their means of support.

The fourth count of the declaration averred that Will E. Bailey derived an income of about three thousand dollars annually from his farm and stock raising and that on the 27th of September, 1912, he purchased intoxicating liquors from the appellant which caused him to become intoxicated and that in consequence of such intoxication the said Will E. Bailey sickened and languished and languishing did live until the 12th of October when he died in consequence of such intoxication and

that the plaintiffs were thereby injured in their means of support.

While the appellant has assigned many errors only one is argued, barring objections to instructions and excessive damages, to wit the question as to whether or not the intoxication proven was the proximate cause of the death of Bill G. Smiley, also the appellees have failed to prove that such death was the result of the intoxication. It is conceded by counsel for appellees that under the law it was incumbent upon the appellees to prove that the selling of liquor by appellant to Bill G. Smiley and the intoxication was the proximate cause of his death. Counsel for appellant insist that it was incumbent upon appellees to prove that such intoxication caused him to fall from said wagon, that he was injured by the fall and that such injuries as a natural and continuous sequence, unbroken by any new or independent cause produced his death. And further contend that the intoxication without the intervention of some other cause could not have caused him to become sick, and that under any consideration in the case the fall from the wagon must be taken into consideration in determining the proximate cause; that in as much as he lived for thirteen days without any visible appearance of injury from the fall and then died of the nose bleed, that to say it was caused by the intoxication is merely a matter of conjecture and suspicion.

It appears from the evidence in this case, and is not disputed, that the deceased was a strong and healthy man; that he was not in the habit of becoming intoxicated; that his only affliction was deafness which came to him when about twenty-one years of age from spinal meningitis; that on the day in question

that the plaintiffs were thereby injured in their means of support.

While the evidence has analyzed every argument, we is argued, having objections to instructions and excepting to ~~[illegible]~~ the question as to whether or not the intoxication proven was the proximate cause of the death of Will G. Dailey, also the appellees have failed to prove that such death was the result of the intoxication. It is conceded by counsel for appellees that under the law it was incumbent upon the appellees to prove that the selling of liquor by appellant to Will G. Dailey and the intoxication was the proximate cause of his death. Counsel for appellant insist that it was incumbent upon appellees to prove that such intoxication caused him to fall from a rig wagon, that he was injured by the fall and that such injuries as a natural and continuous sequence, untrammeled by any knee or independent cause produced his death. And further contend that the intoxication without the intervention of some other cause could not have caused him to become sick, and that under any circumstances in the case the fall from the wagon must be taken into consideration in determining the proximate cause; that in as much as he lived for thirteen days without any visible consequence of injury from the fall and then died of the none lived, that to say it was caused by the intoxication is merely a matter of conjecture and speculation.

It appears from the evidence in this case, and is not disputed, that the deceased was a strong and healthy man; that he was not in the habit of becoming intoxicated; that his only affliction was deafness which came to him when about twenty-one years of age from spinal meningitis; that on the day in question

(4)

he became very much intoxicated, in fact very drunk. That he fell from his wagon, was dragged upon the ground, was laid out upon the side of the road and that a Mr. Edwards was the first man to approach him, which was about ten o'clock at night. That he found Smiley suffering great pain, so much so that he could not remove him. That on the next morning he was moved to a neighbor's, was sick and vomiting and unable to eat; he was taken to his home, his kidneys and bowels were paralyzed and that from the time of his fall until his death he was almost continuously vomiting and retching, suffered great pain and finally died from hemorrhage produced, as some of the physicians testified, by a ruptured artery. Two of the physicians testified for appellee that he died of alcoholism. The physicians testifying for defendant ~~appellant~~ ~~said~~ that it could not be definitely told what caused the nose bleed without a post mortem examination. Upon cross-examination of the physicians offered by defendant ~~appellant~~ they, or most of them at least, admitted that vomiting and retching might be the cause of the rupturing of the blood vessel; that increased pressure in the arteries would cause it, and that the obstructed condition of the bowels and kidneys would cause an increased pressure in the walls of the blood vessels, and some of them admitted that the meningitis with which the deceased was afflicted many years ago might produce a decessed condition of the blood vessels of the head, rendering them brittle and weakened and that in such condition the vomiting and retching, together with the increased pressure of the blood might cause a rupture of the artery.

It appears from the evidence of those who remained with him that he was apparently under a continuous strain during the whole of the time of the sickness, and that it seemed im-

he became very much intoxicated, in fact very drunk. That he fell from his wagon, was dragged upon the ground, was laid out upon the side of the road and that a Mr. Edwards was the first man to approach him, which was about ten o'clock at night. That he found Smiley suffering great pain, so much so that he could not remove him. That on the next morning he was moved to a neighbor's, was sick and vomiting and unable to eat; he was taken to his home, his kidneys and bowels were paralyzed and that from the time of his fall until his death he was almost continuously vomiting and retching, suffered great pain and finally died from hemorrhage produced, as some of the physicians testified, by a ruptured artery. The of the physicians testified for appellant and that it would not be his testimony that caused the nose bleed without a post mortem examination. Upon cross-examination of the physicians offered by appellee they, or most of them at least, admitted that vomiting and retching might be the cause of the rupturing of the blood vessel; that increased pressure in the arteries would cause it, and that the obstructed condition of the bowels and kidneys would cause an increased pressure in the walls of the blood vessels, and some of them admitted that the menstruation with which the deceased was afflicted only years ago might produce a diseased condition of the blood vessels of the head, rendering them brittle and weakened and that in such condition the vomiting and retching, together with the increased pressure of the blood might cause a rupture of the artery.

It appears from the evidence of those who remained with him that he was apparently under a continuous strain during the whole of the time of the sickness, and that it caused in-

possible to give him relief. It seems to us, as it appears from the evidence, that, up to the time of this intoxication, the deceased was a healthy man, not in the habit of becoming intoxicated and no outside force or cause having been shown that would cause or in any manner produce the death, and a continued and uninterrupted sequence of events having transpired without cessation or relief from the time of the intoxication until the death would be sufficient to warrant a jury in arriving at the conclusion that the death was produced from intoxication; at least we are unable to say that the jury was not warranted in reaching this conclusion, and we think that under the circumstances and evidence of the character here produced, that the jury were the judges of the proximate cause. It does not appear that any new and independent cause intervened to produce this nose bleed from which he died but it does appear, and as we think, reasonable, that the intoxication certainly caused the vomiting and retching and that this in its turn might produce a rupture of the artery, causing his death. "The proximate cause of injury must be understood to be that which, in a natural and continuous sequence, unbroken by any new and independent cause, produces the event, and without which that event would not have occurred." Wabash R. R. vs. Coker, 81 App., 660.

"The question upon the trial was whether or not the alleged wrongful act of the defendant was the proximate cause of the injury, and that question was properly submitted to the jury as one of fact." City of Rock Falls vs. Wells, 169 Ill., 224. Coker vs. Wabash R. R., 183 Ill., 223.

In discussing the question as to whether the alleged intoxication was not the proximate cause of the death, the Supreme

possible to give him relief. It seems to us, as it appears from the evidence, that, up to the time of this intoxication, the deceased was a healthy man, not in the habit of becoming intoxicated and no outside force or cause having been shown that would cause or in any manner produce the death, and a continued and uninterrupted sequence of events leading straight to the death without assistance or relief from the act of the injured party can not warranted in treating this consideration and so think that under the circumstances and evidence of the surgeon or both physicians, that the jury were the judges of the material case cause. It does not appear that any new and independent cause intervened to produce this once blood from which to flow but it does appear, and we so think, reasonable, that the intoxication certainly caused the vomiting and retching and that this in its turn might produce a rupture of the artery, causing his death. "The proximate cause of injury may be maintained to be that which, in a natural and continuous sequence, unbroken by any new and independent cause, produces the event, and without which that event would not have occurred." Kohnen v. C. W. Post, 71 App. Div. 190.

The questions were the trial was whether or not the alleged wrongful act of the defendant was the proximate cause of the injury, and that question was properly submitted to the jury as one of fact." City of New York v. Wells, 189 III., 124. Cohen v. Kansas R. R., 183 III., 312.

In discussing the question as to whether the alleged intoxication was not the proximate cause of the death, the Supreme

Court, in the case of Meyer vs. Butterbrodt, 146 Ill., 134, says, "Whether an act is the proximate cause of an injury is a question for the jury, upon the evidence, under appropriate instructions." The jury having been properly instructed in this case we must conclude that we have no right to disturb their finding upon the question of proximate cause.

It is next contended that the verdict is excessive. The evidence in this case shows that the deceased was an active, energetic and reasonably prosperous man; that he made money. His earnings power is shown to be fifteen hundred dollars or more per annum; that he properly supported and provided for his children. The children were of an age in which they would require education and the ordinary expenses of bringing them to man-hood and womanhood. The amount allowed them was only one thousand dollars each. It has been repeatedly held by this court and the Supreme Court that the amount of damages is a question for the jury and that its verdict should not be disturbed unless it appears that the jury were influenced by sympathy or prejudice or some other improper motive in finding the amount of damages; we see nothing of that character in this verdict or in this record and we do not believe that we have any right to interfere with the jury's finding in this respect.

Complaint is made of appellee's fourth instruction because it concludes as follows: "Then the law makes it your duty to find said defendant guilty and assess the plaintiffs damages as explained in these instructions." This instruction commences by advising the jury that if they believe from the weight of the evidence certain facts, reciting them, then it became their duty to find for the plaintiff. No complaint

Court, in the case of Geyer vs. Butterfield, 146 Ill., 124, says, "Neither do we do the proximate cause of an injury is a question for the jury, upon the evidence, under appropriate instructions." The jury having been properly instructed in this case we must conclude that we have no right to disturb their finding upon the question of proximate cause.

It is next contended that the verdict is excessive. The evidence in this case shows that the deceased was a strong, energetic and reasonably prudent man; that he made plenty, his earning power is shown to be fifteen hundred dollars or more per annum; that he properly supported and provided for his children. The children were of an age in which they would require education and the ordinary expenses of living, food, to two-food and accordingly. The amount allowed there was duly one thousand dollars each. It has been repeatedly held by this court and the Supreme Court that the amount of damages is a question for the jury and that its verdict should not be disturbed unless it appears that the jury were influenced by prejudice or passion or some other improper motive in fixing the amount of damages; we see nothing of that character in this verdict or in this record and we do not believe that we have any right to interfere with the jury's finding in this respect.

Complaint is made of appellee's fourth instruction because it concludes as follows: "Then the law makes it your duty to find said defendant guilty and assess the plaintiffs damages as explained in these instructions." This instruction concerns by advising the jury that if they believe from the weight of the evidence certain facts, meeting them, then it becomes their duty to find for the plaintiff. We complaint

is made of the insufficiency of the facts set forth in the instruction that must be proven by the weight of the evidence before the plaintiff would be allowed to recover, and upon a reading of this instruction, so far as we can see, the things essential to be proven by plaintiff before a recovery can be had, are fully set forth, and we are unable to see that if plaintiff had proven all of the matters necessary to make their case why it would not be the duty of the jury to find the defendant guilty. The criticism made upon this instruction and upon instruction No. 5 are without merit.

Instructions ten and eleven are criticised as having invaded the province of the jury in determining the proximate cause. It is true, these instructions advise the jury that, "If as a natural result of sales deceased became intoxicated and sickened, and that such sickness induced in him an increased strain upon the arteries of the body, whereby an artery was ruptured and he died therefrom, then such sales would be the proximate cause of his death, and this, notwithstanding that there might have been at the time a diseased condition of his artery.which rendered it more liable to burst from increased pressure." While instructions of this character are subject to criticism, yet no complaint is made but what the elements set forth would in law constitute proximate cause, and nothing pointed out as to how the jury could have been misled by them. It appears that the deceased had at one time been afflicted by spinal meningitis, which tended to harden the arteries of the head, and defendants sought to show that the hemorrhage was attributable to the weakened condition of the arteries, and these instructions, especially the tenth one, was given to advise the jury that the diseased condition of the arteries would not prevent the intoxication from being the

is made of the insufficiency of the facts set forth in the instruction that must be proven by the weight of the evidence before the plaintiff would be allowed to recover, and upon a reading of this instruction, so far as we can see, the things essential to be proven by plaintiff before a recovery can be had, are fully set forth, and we are unable to see that if plaintiff had proven all of the matters necessary to make their case why it would not be the duty of the jury to find the defendant guilty. The criticism made upon this instruction and upon instruction No. 5 are without merit.

Instructions ten and eleven are criticised as having invaded the province of the jury in determining the proximate cause. It is true, these instructions advise the jury that, "If as a natural result of sales deceased became intoxicated and sickened, and that such sickness induced in him an increased strain upon the arteries of the body, thereby an artery was ruptured and he died therefrom, then such sales would be the proximate cause of his death, and this, notwithstanding that there might have been at the time a diseased condition of his artery which rendered it more liable to burst from increased pressure." While instructions of this character are subject to criticism, yet no complaint is made but that the elements set forth would in law constitute proximate cause, and nothing pointed out as to how the jury could have been misled by them. It appears that the deceased had at one time been afflicted by spinal meningitis, which tended to harden the arteries of the head, and defendants sought to show that the hemorrhage was attributable to the weakened condition of the arteries, and these instructions, especially the tenth one, are given to advise the jury that the diseased condition of the arteries would not prevent the intoxication from being the

proximate cause, if it were such in fact, ~~such~~ instructions of this character have been approved in the case of T. W.& W.R.R. Co. V. Ingraham, 77 Ill., 309.

Instruction No. 12 is criticised for using the term ~~xxxxxxxx~~ "however slight", in speaking of a preponderance of the evidence. It is conceded by appellant that if the evidence for plaintiff preponderated "but slightly" that this would make the instruction good. We see no material difference, and the criticism is not well taken.

The objection to Instruction No. 13, that it omits from the things to be considered in determining the preponderance of the evidence "the question of witnesses" is not well founded as the reading of the whole instruction calls the attention of the jury to the number of witnesses, as well as the other things to be considered.

Objection is urged to instruction No. 14, because it informs the jury that the plaintiffs were not required to prove their case by the doctor, and urges as a reason, that the case could not be proven in any other manner; this involves the question of proof of the proximate cause, which has been disposed of in this opinion.

We can see no reason why the expert opinion of doctors were necessary if the facts connecting the death with the intoxication could be proven by those persons attending him.

Complaint is made of the refusal of one of defendant's instructions. We can see no valid reason why this instruction should be refused. It advises the jury that the testimony of the physicians as a class should be considered by the jury with all of the other evidence in the case. It may be faulty in

proximate cause, if it were in fact. Instructions of this character have been approved in the case of T. K. & N.R.R. Co. v. Ingersoll, 77 Ill., 305.

Instruction No. 12 is criticized for using the term "preponderance of the evidence", in speaking of a preponderance of the evidence. It is conceded by appellant that if the evidence for plaintiff preponderated "not slightly" that this would make the instruction good. There was no material difference, and the criticism is not well taken.

The objection to instruction No. 13, that it omits from the things to be considered in determining the preponderance of the evidence "the question of witnesses" is not well founded as the reading of the whole instruction omits the attention of the jury to the number of witnesses, as well as the other things to be considered.

Objection is urged to instruction No. 14, because it informs the jury that the plaintiffs were not required to prove their case by the doctor, and urges as a reason, that the case could not be proven in any other manner; this involves the question of proof of the proximate cause, which has been disposed of in this opinion.

We can see no reason why the expert opinion of doctors was necessary if the facts connecting the death with the intoxication could be proven by these persons attending him.

Complaint is made of the refusal of one of defendant's instructions. We can see no valid reason why this instruction should be refused. It advises the jury that the testimony of the physicians as a class should be considered by the jury with all of the other evidence in the case. It may be fairly in

calling the attention of the jury to particular witnesses but as it referred to a class of witnesses that were produced upon both sides of the case it should have been given. We do not think, however, its refusal is reversible error, as the jury surely understood that they were to consider the testimony of the physicians or the court would not have permitted it to be put in evidence.

After a careful examination of this record we are of the opinion that under the evidence and instructions of the court the questions of proximate cause and of damages were questions for the jury, and that under the state of this record we are not authorized in any manner to interfere with the finding of the jury. While the instructions given by the court are not in every respect formal and accurate, yet taken as a whole we believe the law of the case was fairly and fully presented to the jury, and that no such errors were committed as would justify a reversal of the case. In fact nothing has been pointed out, and we have not been able to see anything prejudicial to the defendant by the errors complained of. The evidence is abundant, and undisputed that the appellant sold the deceased the liquor that caused him to be intoxicated, and the jury have determined that such intoxication was the proximate cause of his death and we can see no reason for disturbing the verdict, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

(Not to be reported in full.)

calling the attention of the jury to particular witnesses but as it referred to a class of witnesses that were produced upon both sides of the case it should have been given. We do not think, however, the refusal is reversible error, as the jury evidently understood that they were to consider the testimony of the physicians or the court would not have permitted it to be put in evidence.

After a careful examination of this record we are of the opinion that under the evidence and instructions of the court the questions of proximate cause and of damages were questions for the jury, and that under the state of this record we are not authorized in any manner to interfere with the finding of the jury. While the instructions given by the court are not in every respect formal and accurate, yet taken as a whole we believe the law of the case fairly and fully presented to the jury, and that no such errors were committed as would justify a reversal of the case. In fact nothing has been pointed out, and we have not been able to see anything injurious to the defendant by the errors complained of. The evidence is conflicting, and undisputed that the appellee's wife drank the liquor that caused him to be intoxicated, and the jury have determined that such intoxication was the proximate cause of his death and we can see no reason for disturbing the verdict, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th *day of* November, *A. D. 1914.*

A C Millspaugh

Clerk of the Appellate Court.

OPINION

Fee $ .....

1196

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the ---------1st----- *day of* ~~May~~ Sept. *A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

(March term, 1915)

(Rehearing Denied)

Ernest Smiley, Perry Smiley and Opal Smiley, who sue by their next friend, Nora Smiley.

Appellees.

vs.

No. 79.
March 5.
~~October~~ Term, 1914.

Millard Barnes,

Appellant.

~~ERROR TO~~
APPEAL FROM

Circuit. COURT

Massac. COUNTY

TRIAL JUDGE

HON. WM. M. CLEMENS.

Term No. 79. In the Appellate Court. Agenda No.34.

Fourth District.

March Term, A. D. 1915.

Ernest Smiley, Perry Smiley and Opal Smiley, who sue by their next friend, Nora Smiley, Appellees.	
vs.	Appeal from the
Millard Barnes, Appellant.	Circuit Court of Massac County.

PER CURIAM

An opinion was filed in the above entitled cause in this court on October 27, 1914, whereupon the appellant presented a petition for a rehearing of said cause, and the court at that time, after a further examination of the opinion and the authorities cited, fearing that an error may have been committed in the giving of instruction No. 5 for the plaintiff, for that reason a rehearing was granted on March 24, 1915.

The particular part of instruction No. 5 that is criticised and assigned as a reason for a rehearing is, "The court instructs the jury that it is not for them to inquire into or consider the propriety of the law in force relating to the sale of intoxicating liquors under which this action is brought." In support of this contention counsel for appellant refers

Term No. 71. In the Appellate Court.

Fourth District.

March Term, A. D. 1915.

Robert Dailey, Terry Dailey and Pat Dailey, who sue by their next friend, Tom Dailey, Appellees.	
vs.	Appeal from the
Millard Barnes, Appellant.	Circuit Court of Sangamon County.

Lum, J. delivered the opinion of the court.

An opinion was filed in the above entitled cause in this court on October 27, 1914, whereupon the appellant presented a petition for a rehearing of said cause, and the court at that time, after a further examination of the opinion and the authorities cited, fearing that an error may have been committed in the giving of instruction No. 5 for the plaintiff, for that reason a rehearing was granted on March 24, 1915. The particular part of instruction No. 5 that is criticised and assigned as a reason for a rehearing is, "The court instructs the jury that it is not for them to inquire into or consider the propriety of the law in force relating to the sale of intoxicating liquors under which this action is brought." In support of this contention counsel for appellant refers

to the case of Hanewacker Vs. Ferman, 152 Ills., 321, in which an instruction similar to the one given herein was criticised and the court there said, "We doubt the propriety of instructing a jury in any civil action, that it is their duty to enforce the law. But such language is too strong in a suit under section 9 of the Dram Shop Act. We have held, that, in this proceeding, exemplary damages will not be awarded, unless there is a finding of actual damages. We have also held that there is no distinction between exemplary damages and damages allowed as a punishment; that exemplary damages, punitive damages or damages recovered as a punishment, all mean the same thing. When the jury were told that the law as it stands upon the statute book of this state, should be enforced, and it is the sworn duty of the jury, in a proper case, to enforce it, they must have understood, that it was their duty to award such damages as are allowable as a punishment, or in other words, vindictive or punitive damages. They were told in another instruction, that plaintiff must have sustained actual damages, in order to justify a finding of vindictive damages. But they were not bound to give the plaintiff vindictive damages. A jury will be permitted to award such damages if they shall believe, from all the circumstances, that the plaintiff ought to recover vindictive damages". It will be observed in the case above referred to, there was a claim for vindictive damages and instructions were given along that line and the jury were advised that under certain circumstances vindictive

to the case of Janeweckor Vs. Peterson, 132 Ills., 321, in which an instruction similar to the one given herein was criticised and the court there said, "We doubt the propriety of instructing a jury in any civil action, that it is their duty to enforce the law. But such language is too strong in a suit under section 9 of the Tree Damage act. We have held, that in this proceeding, exemplary damages will not be awarded, unless there is a finding of actual damages. Indeed, we have also held that there is no distinction between exemplary damages and damages allowed as a punishment; that exemplary damages, punitive damages or damages recovered as a punishment, all mean the same thing. When the jury were told that the law as it stands upon the statute book of this state, should be enforced, and it is the sworn duty of the jury, in a proper case, to enforce it, they must have understood, that it was their duty to award such damages as are allowable as a punishment, or in other words, vindictive or punitive damages. They were told in another instruction, that plaintiff must have sustained actual damages, in order to justify a finding of vindictive damages. But they were not found to be the plaintiff vindictive damages. A jury will be justified to award such damages if they shall believe, from all the circumstances, that the plaintiff sustained actual damages. It will be observed in the case above referred to, there was a claim for vindictive damages and instructions were given along that line and the jury were advised that under certain circumstances vindictive

damages could be awarded; and the court, as we read that opinion, criticises that instruction because of the fact that vindictive damages were being claimed and that the jury might understand that it was their duty to enforce the law with reference to vindictive damages. In the case now under consideration there is no claim, either in the declaration or in any of the evidence offered, or instructions given, for vindictive damages. The only claim made in any shape or form was for injuries to appellees means of support, and this point is made very clear both by the instructions given for appellee and those given for appellant, and we do not believe that the jury could have been misled by this instruction or that they were in any manner advised that punitive damages could have been given in the case. The reason of the rule laid down in the case referred to not being present in this case, we are of the opinion that it is not decisive xx of the matters herein.

It is also contended that the opinion finds that the deceased "during the whole period of time from the time Will G. Smiley fell from his wagon until he died his bowels were paralyzed and after repeated efforts of the doctors they were unable to get an operation of his bowels". We have examined the opinion and find no such statement contained therein. We do find that the court says that "His kidneys and bowels were paralyzed and that from the time of his fall until his dealth he was almost continually vomiting and retching, etc," which statement, we think, is

damages could be awarded; and the court, as we read that opinion, criticizes the instruction because it has not been sufficiently emphasized that the jury might understand that it was their duty to award the law with reference to vindictive damages. In this case, upon consideration there is no claim, either in the declaration or in any of the evidence offered, for instructions given, for vindictive damages. The only claim made in any shape or form was for injury to excellent means of support, and this point is made very clear both by the instructions given for appellee and those given for appellant, and we do not believe that the jury could have been misled by this instruction or that they were in any manner advised that punitive damages could have been given in the case. The reason of the rule laid down in the case referred to not being present in this case, we are of the opinion that it is not decisive xx of the matters herein.

It is also contended that the opinion finds that the deceased "until the week ending at the time the time Bill C. Bailey fell from his wagon until he died his bowels were paralyzed and after repeated efforts of the doctors they were unable to get an operation of the bowels". We have examined the opinion and find no such statement contained therein. We do find that the court says that "his kidneys and bowels were paralyzed and from the time of his fall until his death he was almost continually vomiting and retching, etc." which statement, we think, is

fully sustained by the evidence. While it does appear from the evidence that the deceased was at one time intoxicated and at other times drank whiskey, it does not appear that he was in the habit of becoming intoxicated.

After a full consideration of the petition for a rehearing we are of the opinion that the points set forth therein are not well taken, and that the opinion of the court as heretofore filed is correct, and sustained by the record. It is therefore ordered that the opinion heretofore filed in this case be and the same is hereby adopted and ordered to be re-filed herein, and that the judgment of the lower court be affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

damages would be awarded; and the court, as we read that opinion, criticizes that instruction because of the fact that vindictive damages were being claimed and that the jury might understand that it was their duty to enforce the law with reference to vindictive damages. In the case now under consideration there is no claim, either in the declaration or in any of the evidence offered, an instructions given, for vindictive damages. The only claim made is not that a tort was let injuriously by malicious means of support, and this point is made very clear both by the instructions given for appellee and those given for appellant, and we do not believe that the jury would have been misled by this instruction or that they were in any manner advised that punitive damages could have been given in the case. The reason of the rule laid down in the case referred to not being present in this case, we are of the opinion that it is not decisive as of the written opinion.

It is also contended that the motion state that the deceased "during the whole period of time from the time Will C. Bailey fell from his wagon until he died his bowels were paralyzed and after repeated efforts of the doctors they were unable to get an operation of the bowels". We have examined the motion and find no such statement contained therein. We do find that the court says that "his kidneys and bowels were paralyzed and that from the time of his fall until he died the [illegible] and retching, etc." which statement, we think, is

fully sustained by the evidence. While it does appear from the evidence that the deceased was at one time intoxicated and at other times drank whiskey, it does not appear that he was in the habit of becoming intoxicated.

After a full consideration of the petition for a rehearing, we are of the opinion that the points set forth therein are not well taken, and that the opinion of the court as heretofore filed is correct, and sustained by the record. It is therefore ordered that the opinion heretofore filed in this case be and the same is hereby adopted and ordered to be re-filed herein, and that the judgment of the lower court be affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

[illegible] fully established by the evidence. [illegible] appears from the evidence that the deceased was at one time intoxicated and at other times drank [illegible], it does not appear that he was in the habit of becoming intoxicated.

After a full consideration of the petition for a rehearing we are of the opinion that the points set forth therein are not well taken, and that the opinion of the court as heretofore filed is correct, and sustained by the record. It is therefore ordered that the opinion heretofore filed in this case be and the same is hereby adopted and ordered to be re-filed herein, and that the judgment of the lower court be affirmed.

[illegible]

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of* ~~May~~ Sept., *A. D. 1915.*

Clerk of the Appellate Court.

OPINION

Fee $.....

Decree Brought March 27 1915

(191)

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of ~~March~~ October in the year of our Lord, one thousand nine hundred and fourteen, the same being the 27th day of ~~March~~ October, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, ~~Presiding~~ Justice.
Hon. James C. McBride, Presiding Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. W. S. PAYNE, Sheriff

And afterwards ~~in Vacation, after said March term,~~ to-wit: On the 9th day of ~~July~~ November, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

(March Term 1914)

196 I.A. 536

~~ERROR TO~~
APPEAL FROM

Smiley

vs.

No. 42

March Term, 1914.

Barnes v Hardin

Circuit COURT

Massac COUNTY

TRIAL JUDGE

Hon. A. N. Lewis

Term No. 42. Agenda No. 29.

March Term, A. D. 1914.

Nora Smiley, Appellee, vs. Willard Barnes, Appellant.	Appeal from Massac County.

McBride, J.

The deceased of Will Smiley and the loss of his support were the basis of action in this case, and in the case of Ernest Smiley et al., vs. Willard Barnes, decided at the present term of this court. The pleadings and evidence are substantially the same, except that in this case they are adopted to the loss of Will Smiley as the means of support of the widow, and in the other case to the means of support of the children, and we can see no occasion for a re-statement of the facts and conclusions reached in that case, and we adopt the opinion in the case of Ernest Smiley et al. vs. Willard Barnes as the opinion of the court in this case, except as to the question of appellee's right to challenge a juror of the second four after the panel of four jurors had been passed upon and accepted by both parties, but before the last four of the panel had been accepted and the jury sworn, and except also as to some instructions different from the instructions given in that case.

The first question here presented is, Was it reversible error to allow appellee to challenge a juror peremptorily of the second four after they had been passed upon and accepted and before the last panel had been accepted? This is claimed by

Term No. 42. Docket No. 79.

Marion Term, A. D. 1914.

Mary Smiley, Appellee, vs. William Barnes, Appellant.	Appeal from Tazewell County.

Decision, 1.

The decease of Will Smiley and the loss of his support were the basis of action in this case, and in the case of Ernest Smiley et al., vs. William Barnes, decided at the present term of this court. The pleadings and evidence are substantially the same, except that in this case they are adopted to the loss of Will Smiley as the means of support of the widow, and in the other case to the means of support of the children, and we can see no occasion for a re-statement of the facts and conclusions reached in that case, and we adopt the opinion in the case of Ernest Smiley et al. vs. William Barnes as the opinion of the court in this case, except as to the question of appellee's right to challenge a juror at the second four after the panel of four jurors had been passed upon and accepted by both parties, but before the last four of the panel had been accepted and the jury sworn, and except also as to some instructions different from the instructions given in that case.

The first question here presented is, Was it reversible error to allow appellee to challenge a juror peremptorily at the second four after they had been passed upon and accepted and before the last panel had been accepted? This is claimed by

appellants as reversible error and in support of this contention reference is made to the case of Myers vs. Smith, 121 Ill., 448. From an examination of the case referred to it does appear that it is not reversible error to refuse a peremptory challenge under such circumstances. They say that after a panel of four has been accepted that unless good cause be shown that the right of peremptory challenge does not then exist. It will be borne in mind that in the case referred to the appellant made the application to challenge the juror peremptorily, the court refused it and this was assigned for error and the Supreme Court held it was not error but in deciding that case the Supreme Court expressly says, "The question which is here presented and decided is as to the right of peremptory challenge. We decide or intimate nothing in respect of a court's discretion as to the allowance of a peremptory challenge in such case." We do not believe that this statute should be given a construction that would so restrict the trial Judge that he could not permit a party to challenge a juror peremptorily, if he deemed it necessary and proper for the furtherance of justice, even though no cause for challenge allowed by statute existed. We areinclined to think that this statute is directory and unless it is shown that some injustice has resulted, the exercise of a discretion in permitting a peremptory challenge ought not to work a reversal of the case; besides it appears from the very language of the Supreme Court in stating, "We decide or intimate nothing in respect of a court's discretion as to the allowance of a peremptory challenge in such case,", shows that they had in mind then that under certain circumstances a peremptory challenge might be allowed

appellants as reversible error and in support of this contention reference is made to the case of Myers vs. Smith, 121 Ill., 448. From an examination of the case referred to it does appear that it is not reversible error to refuse a peremptory challenge under such circumstances. They say that if a panel of four has been accepted that makes good cause be shown that the right of peremptory challenge does not then exist. It will be borne in mind that in the case referred to the appellant made the application to challenge the juror peremptorily, the court refused it and this was assigned for error and the Supreme Court held it was not error but in deciding that case the Supreme Court expressly says, "The question which is here presented and decided is as to the right of peremptory challenge. We decide or intimate nothing in respect of a court's discretion as to the allowance of a peremptory challenge in such case." We do not believe that this statute should be given a construction that would as matters of matter judge that he could not permit a party to challenge a juror peremptorily, if he deemed it necessary and proper for the furtherance of justice, even though no cause for challenge allowed by statute existed. We are inclined to think that this statute is directory and unless it is shown that some injurious ice has resulted, the exercise of a discretion in permitting a peremptory challenge ought not to work a reversal of the case; besides it appears from the very language of the Supreme Court in stating, "We decide or intimate nothing in respect of a court's discretion as to the allowance of a peremptory challenge in such case", shows that they had in mind that under certain circumstances a peremptory challenge might be allowed

by the trial judge without committing error. Many cases have been decided holding, in effect, that the manner of selecting a jury in accordance with the statute is not in all cases required to be strictly pursued. In the case of Gibert vs. People, 143 Ill., 571, where the jury had not been selected in a murder case in the manner provided by statute, and this had been assigned for error, the court said, "It is not claimed the jury selected in the mode it was selected was prejudiced against the defendants, or that they were not fair minded and intelligent. We are unwilling to say this case should be reversed on account of this alleged error.

There are some instructions in this record that were not in the other, that have been objected to which we will now examine. It is claimed that instruction No. 4 given for appellee is argumentative and misleading. Just how it is misleading or what constitutes the argument is not pointed out and does not appear from a rezding of the instruction.

Instruction No. 5 is criticised because it tells the jury it is not for them to inquire into or consider the propriety of the law in force relating to the sales of intoxicating liquors, and in support of this criticism counsel cites Kanewacker vs. Herman - 152 Ill., 321. It is true that an instruction in some respects similar to this one was held erroneous in that case but an examination of the two instructions will disclose that the instruction in that case was much more positive in its terms than this one, and the reason upon which it was held to be erroneous was that as exemplary damages were sought in that case the jury must have understood it was their duty to award such damages as were allowed as vindictive dam-

by the trial judge without committing error. Many cases have been decided holding, in effect, that the manner of selecting a jury in accordance with the statute is not in all cases required to be strictly pursued. In the case of Sibert vs. Temple, 143 Ill., 571, where the jury had not been selected in a proper case in the manner provided by statute, and this was assigned for error, the court said, "It is not claimed the jury selected in the case it was selected was prejudiced against the defendants, or that they were not fair minded and impartial. We are unwilling to say this case should be reversed on account of this alleged error.

There are some instructions in this record that were not in the other, that have been objected to which we will now review. It is claimed that instructions. 4 given for appellee is argumentative and misleading. Just how it is misleading or just what constitutes the argument is not pointed out and does not appear from a reading of the instructions.

Instruction No. 5 is criticised because it tells the jury it is not for them to inquire into or consider the propriety of the law in force relating to the sales of intoxicating liquors, and in support of this criticism counsel cites Hanewacker vs. Ferman - 158 Ill., 321. It is true that an instruction in some respects similar to this one was held erroneous in that case but an examination of the two instructions will disclose that the instruction in that case was much more positive in its terms than this one, and the reason upon which it was held to be erroneous was that as exemplary damages were sought in that case the jury must have understood it was their duty to award such damages as were claimed as vindictive dam-

ges. In the case under consideration, however, the jury are expressly told that if they find for the plaintiff they should assess her damages at what she has proven by the weight of the evidence to have suffered in her means of support. The case of Buck vs. Maddock, 167 Ill., 219, seems to distinguish the instruction held to be erroneous in the Hanewacker vs. Fermon case (Supra) from similar instructions where the question of vindictive damages are not involved. It says, "While the propriety of telling the jury that the law shall or should be enforced may well be doubted, the instruction in this case, in so far as it directs the jury as to their duty in arriving at a verdict is concerned, isfree from objection, and, if it stood alone, would not be reasonably understood by a jury as authorizing the allowance of other than actual damages. But certainly, in view of the other instructions given, even if it had contained the expression condemned in the case cited, no reversible error would have resulted." Buck vs. Maddock(Supra).

Objection is also made to two of the instructions, that they informed the jury that if they find for the plaintiff they are limited to the ad damnum mentioned in the declaration, which was ten thousand dollars. A n instruction similar to this was held to be erroneous in the case of I.C.R.R.Co. vs. Johnson, 221 Ill., 49, but not so much on account of its referring to the ad damnum as on account of having omitted to limit the instruction to the elements for which plaintiff was entitled to recover. In the present case, however, the instructions, so far as we have been able to see, all of them refer to the question of damages and limits the recovery to her loss of means of support, which is proper, and at all events the jury were not misled

[illegible]

[illegible] In the case under consideration, however, the jury was expressly told that if they find for the plaintiff they should assess her damages at what she has proven by the weight of the evidence to have suffered in her means of support. The case of Buck vs. Maddock, 167 Ill., 419, seems to distinguish the instruction held to be erroneous in the Lamoureux vs. Jerman case (supra) from similar instructions where the question of relative damages are not involved. It says, "While the principle of telling the jury that the law should be strictly followed may well be doubted, the instruction in this case, in so far as it directs the jury as to their duty in arriving at a verdict be assessed, leaves from objection, and, if it stood alone, would not be reasonably misleading by a jury as matching the allowance of other than actual damages. But certainly, in view of the other instructions given, even if it had contained the expression condemned in the case cited, no reversible error would have resulted." Buck vs. Maddock(supra).

Objection is also made to two of the instructions, that they informed the jury that if they find for the plaintiff they are limited to the ad damnum mentioned in the declaration, which was ten thousand dollars. A instruction similar to this was held to be erroneous in the case of I.C.R.R.Co. vs. Johnson, 221 Ill., 49, but not so much on account of its referring to the ad damnum as on account of having omitted to limit the instruction to the elements for which plaintiff was entitled to recover. In the present case, however, the instructions, so far as we have been able to see, all of them refer to the question of damages and limits the recovery to her loss of means of support, which is proper, and at all events the jury were not misled

by anything contained herein as the verdict wasfor the sum only of Forty-five hundred dollars, a much less amount than was claimed in the ad damnum, showing that the jury was not influenced by this expression. In the case referred to and reversed, where a similar instruction was given, the jury awarded the full amount of the ad damnum. We do not believe that the jury was misled by this instruction.

Instruction six is criticised because the word "contributed" was used instead of the words, "materially assisted or materially contributed". There can be nothing in this objection as there is no pretence or denial but that the intoxication was produced solely by the sale of the appellant, and the question of contribution is not in fact involved in this case.

Instruction No. 12 is criticised because it doesnot limit the damages the appellee is entitled to recover to the loss of her means of support. We have examined this instruction and believe that the instruction does by its terms limit her recovery to the amount she has been injured in her means of support.

It is complained that the court erred in the refusal of appellant's refused instruction No. 4, as it informed the jury that no damages should be awarded to the plaintiff for any loss of support of her children. While this instruction may have been given, we do not think it was reversible error to refuse it.

The other instructions given for appellee and refused for appellant, which have been criticised, have been fully commented upon and disposed of in the opinion in the other case to which reference is made for a decision as to the criticisms.

It is next contended that the verdict is excessive in this case. For the reasons assigned in the former case, we are of the opinion that the question of the amount of damages is a

by anything contained herein as the verdict under the sum only of forty-five hundred dollars, a much less amount than was claimed in the ad damnum, showing that the jury was not influenced by this expression. In the case referred to and reversed, where a similar instruction was given, the jury awarded the full amount of the ad damnum. We do not believe that the jury was misled by this instruction.

Instruction six is criticized because the word "contributed" was used instead of the words, "materially assisted or materially contributed". There can be nothing in this objection as there is no evidence or denial but that the indictment was produced solely by the acts of the appellant, and the question of contribution is not in fact involved in this case.

Instruction No. 12 is criticized because it doesnot limit the damages the appellee is entitled to recover to the loss of her means of support. We have examined this instruction and believe that the instruction does by its terms limit her recovery to the amount she has been injured in her means of support.

It is complained that the court erred in the refusal of appellant's refused instruction No. 4, as it informed the jury that no damages should be awarded to the plaintiff for any loss of support of her children. While this instruction may have been given, we do not think it was reversible error to refuse it.

The other instructions given for appellee and refused for appellant, which have been criticized, been been fully considered upon and disposed of in the opinion in the other case to which reference is made for a decision as to the criticisms.

It is next contended that the verdict is excessive in this case. For the reasons assigned in the former case, we are of the opinion that the question of the amount of damages is a

matter for the jury to detemine and we have no right to interfere with it unless it appears that the jury acted from prejudice or sympathy or from some other improper motive in arriving at the amount, and we are not able to say that anything of that character presents itself in this record and do not think the judgment should be disturbed upon this account. It is said that seventy-five hundred dollars in the two cases is very excessive. The deceased was a young man, healthy, in the prime of life and apparently so situated as to give to his family a comfortable living, the children a good education and to properly care for and maintain them in sickness and we cannot say in face of the finding of the jury that this amount in the two cases is excessive.

The judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

(Not to be reported in full.)

matter for the jury to determine and we have no right to in-
terfere with it unless it appears that the jury acted from
prejudice or bias, or from some other improper motive in
arriving at the amount, and we are not able to say that any-
thing of that character presents itself in this record and we
not think the judgment should be disturbed upon this account.
It is said that seventy-five thousand dollars in the two cases
is very excessive. The deceased was a young man, healthy, in
the prime of life and apparently so situated as to give to his
family a comfortable living. The children's good education was
to properly make for them material gain in advance and we can-
not say in face of the finding of the jury that this sum amount in
the two cases is excessive.

The judgment of the lower court is AFFIRMED.

JUDGMENT AFFIRMED.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th *day of* ~~July~~ November, *A. D. 1914.*

A C Millspaugh

Clerk of the Appellate Court.

OPINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the First *day of* ~~Mar~~ Sept. *A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

(March term, 1915)
Rehearing granted

Nora Smiley,
Appellee.

vs.

No. 80.
March 5.
~~October~~ Term, 1914.

Millard Barnes and Dell Hardin.
Appellants.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Massac. COUNTY

TRIAL JUDGE

HON. A. W. LEWIS.

Term No. 80. In the Appellate Court. Agenda No.35.

Fourth District.

March Term, A. D. 1915.

Nora Wiley, Appellee.	)	
Vs.	)	Appeal from the Circuit Court
Millard Barnes and Dell Hardin, Appellants.	)	of Massac County.

PER CURIAM.

An opinion was filed in the above entitled cause in this court on October 27, 1914, whereupon the appellant presented a petition for a rehearing of said cause and the court at that time, after a further examination of the opinion and the authorities cited, having doubts as to whether or not an error may have been committed in the giving of instruction No. 5 for the plaintiff for that reason a rehearing was granted on March 24, 1915. In the petition for re-hearing complaint is also made of the ruling of the court upon the question of the challenge of the juror as set forth in the opinion, but upon a more careful examination of this question we are satisfied with the holding thereon.

As to the criticism upon instruction No. 7, an examination of the instruction shows that only a portion of the instruction is quoted in the petition for

Term No. 80. In the Appellate Court. Agenda No.38.

Fourth District.

Spring Term, A. D. 1915.

State Railway, Appellee.	
Vs.	Appeal from the Circuit Court of Massac County.
Millard Burnes and Will Hardin, Appellants.	

Opinion.

An opinion was filed in the above entitled cause in this court on October 27, 1914, whereupon the appellant presented a petition for a rehearing of said cause and the court at that time, after a further examination of the opinion and the authorities cited, having doubts as to whether or not an error may have been committed in the giving of instruction No. 5 for the plaintiff for that reason a rehearing was granted on March 24, 1915. In the petition for re-hearing complaint is also made of the ruling of the court upon the question of the challenge of the juror as set forth in the opinion, but upon a more careful examination of this question we are satisfied with the holding therein.

As to the criticism upon instruction No. 7, an examination of the instruction shows that only a portion of the instruction is quoted in the petition for

re-hearing but when the whole instruction is examined and read together it carries with it quite a different meaning from that given by counsel in their petition, and from the quoting of a portion of the instruction.

The criticism made by counsel in their petition upon instruction No. 5 is the same as the criticism made in the case of Ernest Bailey et al vs. Willard Barnes, upon the same instruction, and for our decision upon this criticism we refer to the opinion filed upon a rehearing in said cause.

After a careful examination of the points referred to in appellant's petition for a re-hearing we believe that the opinion heretofore rendered in this cause is fully sustained by the record. It is therefore ordered by the court that the opinion heretofore filed be and is hereby adopted and is ordered to be filed herein as the opinion of this court in this cause, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

re-hearing, but when the whole instruction is examined and read together it agrees with it with a different meaning from that given by counsel in their petition, and from the quoting of a portion of the instruction.

The criticism made by counsel in their petition upon instruction No. 5 is the same as the criticism made in the case of Ernest Smiley et al vs. Illinois Central, upon the same instruction, and for our decision upon this criticism we refer to the opinion filed upon a rehearing in said cause.

After a careful examination of the points referred to in appellant's petition for a re-hearing we believe that the opinion heretofore rendered in this cause is fully sustained by the record. It is therefore ordered by the court that the opinion heretofore filed be and is hereby adopted and is ordered to be filed herein as the opinion of this court in this cause, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of* ~~May~~ Sept, *A. D. 1915.*

C. C. Johnson

Clerk of the Appellate Court.

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the 21st *day of* July *A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

(October 1914)

196 I.A. 556

Handley,

Appellant.

vs.

No. 13.

October Term, 1914.

The People, etc.,

Appellee.

ERROR TO
APPEAL FROM

COUNTY COURT

FAYETTE COUNTY

TRIAL JUDGE

HON. J. H. WEBB.

Term No. 13. In the Appellate Court, Agenda No. 31.

Fourth District.

October Term, A. D. 1914.

Clarence Handley, Appellant.	
vs.	Appeal from the County Court of Fayette County, Illinois.
The People of the State of Illinois, Appellees.	

McBride, P. J.

Judgment was rendered against the appellant in the County Court of Fayette County for $550.00, which appellant seeks to reverse by this appeal.

A child was born to Ella Fay Casey, an unmarried woman, on October 17th, 1913. ~~She~~ filed a complaint against ~~appellant~~ defendant in said County Court on December 8, 1913, charging him with being the father of her child. The prosecutrix testifies that ~~appellant~~ defendant had sexual intercourse with her about the third Sunday in December, on the 12th of January and on the 20th of February. The ~~appellant~~ defendant denies that he had sexual intercourse with her at any time during the months of December, January or February and offers evidence tending to show an alibi as to the date fixed in January.

It appears ~~from the evidence~~ that the prosecutrix and ~~appellant~~ defendant lived about one mile apart and had known each other ever since ~~they were~~ child~~hood~~ and had been keeping company ~~with each other~~ for some time prior to the birth of the child. ~~The jury after hearing the testimony offered by the respective parties found that the appellant was the father of the child, and judgment was rendered accordingly.~~

Term No. 13. In the Appellate Court, Agenda No. 31.

Fourth District.

October Term, A. D. 1914.

Clarence Hadley, Appellant,	
vs.	Appeal from the County Court of Fayette County, Illinois.
The People of the State of Illinois, Appellee.	

Mr. Justice, P. J.

Judgment was rendered against the appellant in the County Court of Fayette County for $350.00, which appellant seeks to reverse by this appeal.

A child was born to Lily Fay Casey, an unmarried woman, on October 17th, 1913. She filed a complaint against appellant in said County Court on December 8, 1913, charging him with being the father of her child. The prosecutrix testifies that appellant had sexual intercourse with her about the third Sunday in December, on the 13th of January and on the 20th of February. The appellant denies that he had sexual intercourse with her at any time during the months of December, January or February and offers evidence tending to show an alibi as to the date fixed in January.

It appears from the evidence that the prosecutrix and appellant lived about one mile apart and had known each other for about two years. Witnesses testified that they were together in company with each other for some time prior to the birth of the child. The jury after hearing the testimony offered by the respective parties found that the appellant was the father of the child, and judgment was rendered against

It is claimed and argued by counsel for appellant that the verdict of the jury is not warranted from the evidence and that the court erred in the giving, refusing and modifying of instructions.

The testimony in this case is conflicting and if the evidence of the prosecutrix and her witnesses is to be believed then there can be no question but what the appellant is the father of her child. She testified to that defendant his having had sexual intercourse with her at the dates above mentioned, and that later he met her at the train on her return from a trip north; and she further testifies to having gone to church with him on the night of January 13th; and that there she sustained improper relations with him upon that date, and she is corroborated by her mother and to some extent by Ida Belle Rhodes as to having been in company with him on the night of January 12th.

It further appears from the evidence that after her mother ascertained that the daughter was pregnant, that the prosecutrix in company with her mother went to the home of Handley and had a talk with him about the paternity of this child; that when the mother said to him that they wanted to settle this trouble he then did not deny the paternity but said he wanted to talk with the daughter privately and they did talk privately, and the mother says that she then told them that they were both to blame and that he then said he did not know what to do, and the daughter said the only objection urged by him was that he had heard that a fellow by the name of Spears had had sexual intercourse with her and that he then admitted they were both to blame, for the trouble that they were in.

It further appears from the evidence that

It is claimed and argued by counsel for appellant that the learned trial Judge is not satisfied from his statement that the court acted in the proper, reasonable and judicial exercise of discretion.

The testimony in this case is conflicting and if the evidence of the prosecutrix and her witnesses is to be believed then there can be no question but that the appellant is the father of her child. Assuming that he had sexual intercourse with her at the dates above mentioned, and that later he met her at the train on her return from a trip north; and she further testifies that he came to church with him on the night of January 13th and that he resumed improper relations with him that date, and she is corroborated by her mother and to some extent by the Bella Mahone as having been in company with him on the night of January 13th.

It further appears from the evidence that after her mother ascertained that the daughter was pregnant, that the prosecutrix in company with her father went to the home of Handley and had a talk with him about the paternity of the child; that when the mother said to him that they wanted to settle this trouble he then did not deny the paternity but said he wanted to talk with the daughter privately and they did talk privately, and the mother says that she then told them that they were both to blame and that he then said he did not know what to do, and the daughter said the only objection urged by him was that he had heard that a relative of her mother had been had sexual intercourse with her and that he then admitted they were both to blame, for the trouble that they were in.

It further appears from the evidence that

~~appellant~~ defendant frequently visited the prosecutrix at her home ~~and that they were in the company of each other many times~~ during the two years prior to the birth of the child. ~~Upon the other hand~~, The ~~appellant~~ defendant denied ~~th~~ that he ever had sexual intercourse with her except on the 2nd of April ~~at the time~~ when he met her on her return home from the north. He claimed that on the night of January 12th he was in company with a young lady at William Donaldson's but ~~does~~ did not attempt to show where he was upon either of the other dates on which she alleged they sustained improper relations. As to the date of January 12 th, he introduced several witnesses whose testimony tends to show that on the night of January 12th she was in company with Homer Rhodes, and the testimony of other witnesses who claim to have been at the church on that evening and did not see ~~appellant~~ defendant and Miss Casey. With such a conflict of evidence it is purely a question for the jury to determine whether or not appellant was the father of the prosecutrix's child, and in view of the fact that she testifies to having had sexual intercourse with appellant on about the third Sunday in December, January 12th and February 20th we do not regard the date of January 12th as absolutely controlling as to when this child was begotten. "Medical writers of the highest celebrity and authority agree, and the fact is well established, that pregnancy is a condition which may exceed the nominal limit for its duration; but the actual limit to this excess, can not, in the present state of physiological science be accurately known. Approximately, its duration may be stated from 260 to 308 days after coition, and the average or usual period is 276 days. Chap. 3, Wharton and Stills,

appellant frequently stated the prosecutrix to say
now and that they were in the company of each other
many times during the two years prior to the birth of
the child. Upon the latter time, the appellant testified
that he had had sexual intercourse with her except on
the 2nd of April at the time he met her on her return
home from the north. He claimed that on the night of
January 12th he was in company with a young lady at
William Donaldson's but does not attempt to show where
he was upon either of the other dates on which the alleged
they sustained improper relations. As to the date of
January 12 th, he introduced several witnesses whose
testimony tends to show that on the night of January 12th
she was in company with Homer Rhodes, and the testimony of
these witnesses the claimed have been at the church on
that evening and did not see appellant and Olive Deary.
With such a conflict of evidence it is purely a question
for the jury to determine whether or not appellant was
the father of the prosecutrix's child, and in view of the
fact that she testifies to having had sexual intercourse
with appellant on about the third Sunday in December, Ja-
nuary 12th and February 20th we do not regard the date of
January 12th as absolutely controlling as to when this
child was begotten. Medical writers of the highest cele-
rity and authority agree, and the fact is well established,
that pregnancy is a condition which may exceed the usual
limit for its duration; but the actual limit to this excess,
can not, in the present state of physiological science be
accurately known. Approximately, its duration may be
stated from 200 to 308 days after coition, and the average
of usual period is 274 days. Dunn. 3, Pierce and Hills,

Vol. 2, P. 1, Med Juris., 3rd edition, tables and authorities there cited." Pike vs. People, 34 App., 113.

It is frequently very difficult todetermine who is telling the exact truth about matters of this character as the anxiety of the mother to secure a parent of the child, and of the accused to avoid the obligations for his erring conduct, are frequently great incentives to conceal the exact facts in any particular case. In this case it is admitted by appellant that he had sexual intercourse with the prosecutrix; he fixes the only date at a time when it would be impossible for him to be the father of the child in question, so that it does appear even from his own admissions that the relations at times were improper, and having been keeping company with each other for two years or more and having been frequently together, and the disposition to sustain this relation having been conclusively proven and admitted, we do not feel willing to disturb the finding of the jury that the appellant is the father of the child.

Criticism is made upon instruction seven given on behalf of the People for the reason that it tells the jury "That if they believe from the evidence that defendant is the father of the child then the date or dates upon which the intercourse occurred between defendant and Ella Fay Casey are entirely immaterial, and also though you may believe from the evidence that the prosecuting witness, Ella Fay Casey, is mistaken as to the particular date upon which the intercourse between her and the defendant occurred, still if you believe from a preponderance of the evidence that the defendant is the real father of the child you are instructed to so find by your verdict".

Vol. 2, C. J. Jur. Trial., Jur. Criim. Bailee and author-
ities cited." Pike vs. People, 34 App., 112.

It is frequently very difficult todetermine
who is telling the exact truth about matters of this
character, as the anxiety of the mother to secure a decree
of the child, and of the accused to avoid the obligations
for his support, are frequently great incentives
to conceal the exact facts in any particular case. In
this case it is admitted by appellant that he had sexual
intercourse with the prosecutrix; he fixes the early date
as a time when it would be impossible for him to be the
father of the child in question, so that it does appear
even from his own admissions that the relations at times
were improper, and having been keeping company with each
other for two years or more and having been frequently
together, and the disposition to sustain this relation
having been conclusively proven and admitted, we do not
feel willing to disturb the finding of the jury that the
appellant is the father of the child.

Criticism is made upon instruction seven given
on behalf of the People for the reason that it tells the
jury "That if they believe from the evidence that defendant
is the father of the child then the date or dates upon
which the intercourse occurred between defendant and Ella
Fay Casey are entirely immaterial, and also should you not
believe from the evidence that the prosecuting witness,
Ella Fay Casey, is mistaken as to the particular date upon
which the intercourse between her and the defendant occurr-
ed, still if you believe from a preponderance of the evi-
dence that the defendant is the real father of the child
you are instructed to so find by your verdict".

We understand, and it is conceded by counsel for appellant, that this instruction was approved in the case of Hawkins vs. People, 79 Ill., 415, and seeks to distinguish it by reference to the case of Madison vs. People, 122 App., 66, which holds that a similar instruction was misleading but in that case the prosecuting witness only claimed to have had sexual intercourse at one time, and fixed it at a particular date and place. We do not believe the instruction was erroneous under the evidence in this case.

The refusal to give appellant's eighth instruction is also assigned for error, and the error complained of is that as the instruction advised the jury that if the plaintiff has not sustained the charge that the defendant is the real father of the child in question or that he is not such father, or if the evidence is evenly balanced as to this point, then you must find for the defendant; that the court modified by striking out "or if on this point the preponderance of the evidence is that he is not such father, or if you find the evidence is evenly balanced". We do not regard the criticism as being well taken as the instruction as modified tells the jury that they must believe appellant to be the father of the child by a preponderance of the evidence. The words striken out do not add anything to the instruction except to emphasize the statement already made. If the verdict can only be found by a preponderance of the evidence then if evenly balanced this instruction advised the jury that the issues should be found for the defendant.

The criticism upon the court modifying appellant's nineteenth instruction by striking out the words

We understand, and it is conceded by counsel for appellant, that this instruction was approved in the case of Dawkins vs. People, 72 Ill., 413, and cases to distinguish it by reference to the case of Madison vs. People, 147 Ill., 66, which notes that a similar instruction was distinctly out of that case the prosecuting witness only claimed to have had sexual intercourse at one time, and fixed it at a particular date and place. We do not believe the instruction was erroneous under the evidence in this case.

The refusal to give appellant's eighth instruction is also assigned for error, and the error complained of is that as the instruction advised the jury that if the plaintiff has not established the charge that the defendant is the real father of the child in question or that he is not such father, or if the evidence is evenly balanced as to this point, then you must find for the defendant, that the court modified by striking out "or if on this point the preponderance of the evidence is that he is not such father, or if you find the evidence is evenly balanced". We do not regard the criticism as being well taken as the instruction as modified tells the jury that they must believe appellant to be the father of the child by a preponderance of the evidence. The words stricken out do not add anything to the instruction except to emphasize the statement already made. If the verdict can only be found by a preponderance of the evidence then if evenly balanced this instruction advised the jury that the issue should be found for the defendant.

The criticism upon the court modifying appellant's nineteenth instruction by striking out the words

"on the 12th day of January, 1913, nor at any other time", is not well taken as the words calling attention to a particular date when other dates have been mentioned in the testimony as well would be misleading; besides, the instruction as given says to the jury "that it is incumbent upon the prosecution to prove by a greater weight of the evidence that the defendant is the real father of the child in question, and if the jury believe from the evidence that the defendant did not have and sustain sexual intercourse with the said Ella Fay Casey during the period in which the said Ella Fay Casey became pregnant, then the defendant cannot be the real father of said child and you should so find by your verdict." In this case, as indicated in the opinion above, we do not think it proper to call attention of the jury to any particular date for if he was the father of the child then under the decision of our Supreme Court the date is not material and could not be material unless it was an impossible date.

The criticism made upon the court's refusal to give instructions Nos. 2, 3 and 4 have been answered in the foregoing opinion.

We believe the criticism upon instruction No. 5 is well taken and that it was error to refuse this instruction but do not think that the error is of that characteras to require a reversal of the case; besides, the jury had been fully instructed that all the facts and circumstances in evidence should be taken into consideration in determining the facts in this case.

The jury were fairly and fully instructed upon all matters in issue upon the trial of this case and in view of the conflicting evidence and the facts and cir-

"on the 12th day of January, 1918, nor at any other time", is not well taken as the words omitting attempts to a particular date, when other dates have been mentioned in the testimony as well would be misleading; besides, the instruction as given says to the jury that it is incumbent upon the prosecution to prove by a greater weight of the evidence that the defendant is the real father of the child in question; and if the jury believe from the evidence that the defendant did not have and sustain sexual intercourse with the said Ella Fay Casey during the period in which the said Ella Fay Casey became pregnant, then the defendant cannot be the real father of said child and you should so find by your verdict." In this case, as indicated in the opinion above, we do not think it proper to call attention of the jury to any particular date for if he was the father of the child then under the decision of our Supreme Court the date is not material and could not be material unless it was an impossible date.

The criticism made upon the court's refusal to give instructions Nos. 2, 3 and 4 have been answered in the foregoing opinion.

We believe the criticism upon instruction No. 5 is well taken and that it was error to refuse this instruction but do not think that the error is of that character to require a reversal of the case; besides, the jury had been fully instructed that all the facts and circumstances in evidence should be taken into consideration in determining the facts in this case.

The jury were fairly and fully instructed upon all matters in issue upon the trial of this case and in view of the conflicting evidence and the facts and cir-

cumstances surrounding this case we cannot say that the verdict of this jury was manifestly against the weight of the evidence, or that the court committed any reversible error in its rulings. The judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

(Not to be reported in full.)

Undoubtedly surrounding this case we cannot say that the rulings of this jury was manifestly against the weight of the evidence, or that the court committed any material error in its rulings. The judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

(Not to be reported in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 21st *day of* May, *A. D. 1915.*

C. C. Johnson

Clerk of the Appellate Court.

OPINION

Fee $.....

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the 21st *day of* July *A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

(October 1914)

Bandy,

Appellee.

vs.

No. 28.

October Term, 1914.

Litchfield & Madison R.R. Co.,

Appellant.

196 I.A. 560

ERROR TO
APPEAL FROM

CIRCUIT COURT

MADISON COUNTY

TRIAL JUDGE

HON. LOUIS BERNREUTER.

Record No. 28. Agenda No. 43.

IN THE APPELLATE COURT

State of Illinois,

Fourth District.

October Term A. D. 1914.

George C. Bandy, Appellee,	:	
vs.	::	Appeal from the Circuit Court Madison County, Illinois.
Litchfield & Madison Railroad Company, Appellant.	:	

McBride, P. J.

The trial in the Court below resulted in a judgment in favor of appellee for one thousand dollars, to reverse which, the appellant prosecutes this appeal.

The declaration ~~in this case consists~~ of three counts, ~~which are~~ substantially the same, and charge that on May 23, 1910 the plaintiff, at the special request of defendant, and while in its employ was taken upon a motor car operated by the defendant to be hauled upon defendant's railroad from his place of work at a bridge near ~~the village of~~ Madison to ~~the City of~~ Edwardsville, ~~and charges that it became the duty of defendant to use due care and diligence in the operation of said motor car to carry the plaintiff safely, yet~~ and the defendant, ~~not regarding its said duty~~, by its servant Clarence Bickle, ~~so~~ negligently operated said motor car that while it was passing along said railroad

Record No. 20. Agenda No. 43.

IN THE APPELLATE COURT

State of Illinois,

Fourth District.

October Term A. D. 1914.

George O. Brady, Appellee, vs. Litchfield & Madison Railroad Company, Appellant.	Appeal from the Circuit Court Madison County, Illinois.

McBride, P. J.

The trial in the Court below resulted in a judgment in favor of appellee for one thousand dollars, to reverse which, the appellant prosecutes this appeal.

The declaration ~~in this case consists~~ of three counts, ~~which are~~ substantially the same, and charge that on May 23, 1910 the plaintiff, at the special request of defendant, and while in its employ was taken upon a motor car operated by the defendant to be hauled upon defendant's railroad from his place of work at a bridge near ~~the village of~~ Madison to ~~the City of~~ Edwardsville, ~~and charges that it became the duty of defendant to use due care and diligence in the operation of said motor car so carry the plaintiff safely, yet~~ the defendant, ~~not regarding its said duty~~, by its servant Clarence Bickle, ~~so~~ negligently operated said motor car that while it was passing along said railroad

near a bridge or tressle ~~on said railroad~~, the ~~said~~ motor car ran against a dog upon the track of said railroad near said bridge or tressle and ~~thereby~~ was derailed, and ~~by means~~ whereby the plaintiff was thrown ~~with great force and violence~~ upon said railroad track and ~~greatly~~ injured.

It appears ~~from the facts in this case~~ that on May 23, 1910, the plaintiff ~~was engaged~~ at work for the defendant upon a bridge near ~~the village of~~ Madison, and that he was acting as foreman of the bridge gang, and ~~had~~ arranged with Clarence Bickle, who operated a motor car for the defendant, and resided at Edwardsville, to come with ~~said~~ the motor car at the close of the days work and haul the plaintiff and his bridge gang ~~from said bridge~~ to Edwardsville; that Bickle at the appointed time came to the bridge and took plaintiff and his associates upon the motor car and started for ~~the city of~~ Edwardsville, ~~and was~~ running at a rate of speed variously estimated at ~~fr~~ from eighteen to twenty-five miles per hour; between Edwardsville and Madison and about five miles north of Madison its railroad crosses a bridge or tressle over Cahokia Creek, and as the motor car came to the ~~said~~ tressle ~~or bridge~~ it struck a dog, and the car was derailed ~~thrown off the track~~ and ~~injured~~ plaintiff was injured.

The controlling question in this case, as presented by this record, is: - Was this motor car negligently operated by defendant's servant Bickle, and did the injury to plaintiff result from such negligent operation? Alois Schmidt was one of the bridge gang

[illegible] a bridge or trestle [illegible], for said motor car run against a dog upon the track of said railroad near said bridge or trestle and thereby was derailed, and by reason whereof the plaintiff was thrown with great force and violence upon said railroad track and greatly injured.

It appears from the facts in this case that on May 21, 1910, the plaintiff was employed by and for the defendant upon a bridge near the village of Madison, and he was acting as foreman of the bridge gang, and was arranged with Clarence Blokle, who operated a motor car for the defendant, and resided at Edwardsville, to come with said motor car at the close of the days work and bring the plaintiff and his bridge gang from said bridge to Edwardsville; that Blokle at the appointed time came to the bridge and took plaintiff and his associates upon the motor car and started for the city of Edwardsville, and was running at a rate of speed variously estimated at from eighteen to twenty-five miles per hour; between Edwardsville and Madison and about five miles north of Madison the railroad crosses a bridge or trestle over Cahokia Creek, and as the motor car came to the said trestle or bridge it struck a dog, and the car was thrown off the track and injured plaintiff.

The controlling question in this case is presented by this record, is - was this car negligently operated by defendant's servant Blokle, and did the injury to plaintiff result from such negligent operation? Blokle Schmidt was one of the bridge gang

that was being carried upon this motor car at this time and was injured at the same time that plaintiff was. He prosecuted a suit against the defendant for the same negligent acts in the operation of this car that are charged in this case, which resulted in a verdict in his favor and was reversed by this Court in the case of Schmidt vs. Litchfield and Madison Railroad Company, 179 Appellate 533, because the verdict was manifestly against the weight of the evidence.

The appellee also obtained a judgment against appellant in the Madison County Circuit Court which was reversed by this Court at the March term 1913, because the verdict was manifestly against the weight of the evidence, and is reported in the 183rd. Appellate 493. The case was remanded and a new trial had, which resulted in a verdict as above stated. It is claimed by counsel for appellee that additional evidence was obtained in the last trial and that by reason of the additional evidence the verdict and judgment should be affirmed. The only additional evidence to which our attention has been called by counsel for appellee, or that we can find in this record, is the testimony of William Schmidt, and upon a careful reading of his evidence we are of the opinion that it does not aid the plaintiff's case, but when taken as a whole, is favorable to appellant upon the controlling question in the case. It also appears ~~from this record without giving the details~~ that the dog that was killed by this motor car belonged to a man by the name of Bowen, and was first seen ~~by the witnesses~~ at the ~~xxxx~~ side of the track and some ~~little~~ distance from this trestle.

that was being carried upon this motor car at this time and was injured at the same time that plaintiff was. He prosecuted a suit against the defendant for the same negligent acts in the operation of this car that are charged in this case, which resulted in a verdict in his favor and was reversed by this Court in the case of Schmidt vs. Springfield and Madison Railroad Company, 179 Appellate 322, because the verdict was manifestly against the weight of the evidence.

The appellee also obtained a judgment against appellant in the Madison County Circuit Court which was reversed by this Court at the March term 1913, because the verdict was manifestly against the weight of the evidence, and is reported in the 183rd. Appellate 483. The case was remanded and a new trial had, which resulted in a verdict as above stated. It is claimed by counsel for appellee that additional evidence was obtained in the last trial and that by reason of the additional evidence the verdict and judgment should be affirmed. The only additional evidence to which our attention has been called by counsel for appellee, or that we can find in this record, is the testimony of Tillie Schmidt, and upon a careful reading of his evidence we are of the opinion that it does not aid the plaintiff's case, but when taken as a whole, is favorable to appellant upon the controlling question in the case. It is ~~argued that the record also~~ ~~contains the testimony that the car that was struck by~~ ~~this motor car backed in a rain by the house of Bowen,~~ ~~and was first seen by the witnesses at the north side of~~ ~~the street and also testimony showing from this street.~~

All of the witnesses seemed to agree that the dog was killed upon the trestle, and at about five or six feet from the end of the trestle, but the question is- When did the dog get upon the railroad track? Was it at some distance from the tressle so that Bickle could have stopped the car, or did he jump in front of the car right at the tressle? If the dog got upon the track at such a distance away from the tressle that Bickle could have stopped his motor car and avoided the injury, then it was his duty to do so, and a failure so to do would be negligence; but if the dog jumped upon the track at the tressle, or so close to it that the car could not be stopped, then we are unable to see that defendant would be liable for the injury.

(5) Alois Schmidt, who was also injured, testified that he noticed the dog jump upon the track about one hundred feet away from the trestle, and that he drew ~~Mr.~~ Bickle's attention to that fact, and told him "Better stop the car because we ~~are~~ are in danger" ~~Mr.~~ Bickle said, "Watch me knock that dog etc.", and that the car was then running about thirty-five miles an hour; that he felt Bickle raise the speed of the car. William Schmidt testified that he saw the dog running along the track and said; "Look out there Mr. Bickle you are going to hit that dog" and he turned around and said; "Watch me hit this dog etc." and just then the dog ran along the track, I guess about seventy feet, two rail lengths; the dog ran along the side of the track and I cautioned him again and turned back to Mr. Bandy, and just then I turned to look around and I seen the dog run on the ties of the bridge etc."; and on cross examination this same witness says; "We were two hundred yards or more from the trestle when he (the dog) left the ~~xxxx~~ men he went a pretty good speed towards

All of the witnesses seemed agree that the dog was killed upon the trestle, and at about five or six feet from the end of the trestle, but the question is- When did the dog get upon the railroad track? Was it at some distance from the trestle so that Bickle could have stopped the car, or did he jump in front of the car right at the trestle? If he did get upon the track at such a distance away from the trestle that Bickle could have stopped his motor car and avoided the injury, then it was his duty to do so, and a failure so to do would be negligence, but if the dog jumpes upon the track at the trestle, or so close to it that the car could not be stopped, then we are unable to see that defendant would be liable for the injury.

Bickle Schmidt testified that he noticed the dog jump upon the track about one hundred feet away from the trestle, and that he drew Mr. Bickle's attention to that fact, and told him "Better stop the car because we are in danger". Mr. Bickle said. "Pshaw, we have hit that dog etc.", and that the car was then running about thirty-five miles an hour; that he left Bickle raise the speed of the car. William Schmidt testified that he saw the dog running along the track and said; "Look out there Mr. Bickle you are going to hit that dog" and he turned around and said; "Watch me hit this dog etc." and just then the dog ran along the track, I guess about seventy feet, he ran lengthwise, the dog ran along the side of the track and I cautioned him again and turned back to Mr. Bandy, and just then I turned to look around and I saw the dog run on the left of the train etc.", and on cross examination this same witness says; "We were two hundred yards or more from the trestle when he (the dog) left the same man he went a pretty good speed towards

the track up the hill. He came in a gallop, ~~galloped~~ all the way along the track. He was about seventy feet or more from the trestle when he came to the track; then our car was about thirty feet from him. The dog was not more than ten feet away from the track when I called Mr. Bickle's attention to it. When he got up to the tracks, he just galloped right along side of the track up to the trestle, when he made one hop on the trestle and started in a kind of trot and fell between the ties and throwed his head over the rails. When the dog jumped on the trestle our car was about eight feet from him." As we read this testimony, when William Schmidt said to Bickle "You are going to hit that dog", the dog was then ten feet away from the track, and it then ran along side of the car and did not pretend to get on the track until just as it reached the trestle when it jumped upon the track.

Another witness introduced by ~~appellee~~, plaintiff, Barney Russel, says that "just before the accident ~~happened~~ the dog was on the side of the track going towards the trestle; the car was then on the other side(south) of Bowen and the boys, coming this way; the next I saw was when the car hit the dog on the trestle." ~~But~~ This witness did not see the dog from the time he saw it coming towards the trestle until he got to it. Randy, the ~~appellant~~ plaintiff, had no recollection of what occurred at this time, and did not remember having seen the dog at all. ~~so that the only witness in this case that says the dog was upon the railroad track and running in front of the motor for a distance before it reached the trestle was~~

the track by the hill. He came in a gallop, galloped all the way along the track. He was about seven, ten or more from the trestle when he came to the track; then our car was about thirty feet from him. The dog was not more than ten feet away from the track when I called Mr. Dickie's attention to it. When he got up to the trestle, he just galloped right along side of the track on the trestle, when he made one bop on the trestle and started in a kind of trot and fell between the ties and thrown his head over the rails. Then the dog jumped on the trestle our car was about eight feet from him." As we read this testimony, when William Schmidt said to Dickie "You are going to hit that dog", the dog was then ten feet away from the track, and it then ran along side of the car and did not pretend to get on the track until just as it reached the trestle then it jumped upon the track.

Another witness introduced by appellee, Henry Russel, says that "just before the accident happened the dog was on the side of the track going towards the trestle; the car was then on the other side(south) of Bowen and the boys, going this way; the next I saw was when the car hit the dog on the trestle." This witness did not see the dog from the time he saw it coming towards the trestle until he got to it. Family, the appellant, had no recollection of what occurred at this time, but thought rather having seen the dog as all, so that the only witness in this case who saw the dog the whole entire time was the dog, the car and the trestle, was the fireman on the engine, who testified he saw the dog for a distance before it reached the trestle and

Alois Schmidt, ~~and his testimony is very much weakened by the stitement~~ made ~~by him~~ to Dr. Ferguson, who says:

"On the evening of the accident Mr. Alois Schmidt said to me at that time and place that some men there on the side of the track were holding the dog, and that the dog got away from them and jumped under the car, and nobody could avoid striking it,--or a statement to that effect; he also said that at the time that the dog sprang out from where these men were and jumped under the car and nobody could avoid striking it; he also said at the same time and place that this was purely an accident and that Mr. Bickle was not to blame in any way." The Doctor further states that on the next morning after the accident Alois Schmidt told him substantially the same thing.

Upon the part of appellant, the testimony of Taylor, an occupant of the car, shows that the first that he saw the dog was when it was five or six feet away from the trestle. He also denies having heard any statement made by Schmidt to Bickle about striking the dog. Bowen, the owner of the dog says that just a second or two before the accident happened the dog was with him at some distance to the side of the railroad, which was fixed by some of the witnesses at about sixty feet, and that the dog was sitting there by him while he was emptying some berries and the next he knew the car was going over the dog. Edward Meyer says that when Bowen started to emptying some berries from his hat into a bucket that the dog was then lying down beside of Bowen, and that it

It is Dismissed, and the judgment is reversed by the statement made by Dr. Ferguson, who says: "On the evening of the accident Mr. Alois Schmidt said to me at that time and place that some men there on the side of the track were holding the dog, and that the dog got away from them and jumped under the car, and no-body could avoid striking it.—So a statement to this effect; he also said that at the time that the dog sprang out from where these men were and jumped under the car nobody could avoid striking it; he also said at the same time and place that this was purely an accident and that Mr. Bickle was not to blame in any way." The Doctor further states that on the next morning after the accident Alois Schmidt told him substantially the same thing.

Upon the part of appellant, the testimony of Taylor, an occupant of the car, shows that the first that he saw the dog was when it was five or six feet away from the trestle. He also denies having heard any statement made by Schmidt to Bickle about striking the dog. Bowen, the owner of the dog says that just a second or two before the accident happened the dog was with him at some distance to the side of the railroad, which is fixed by some of the witnesses at about sixty feet, and that the dog was sitting there by him while he was emptying some bottles and the next he knew the car was going over the dog. Edward Meyer says that when Bowen started to emptying some bottles from his hat into a bucket that the dog was then lying down beside of Bowen, and that it

was about four or five seconds from the time that he saw the dog sitting by Bowen until he saw him go under the car. Joe Hennen said "When Mr. Bowen began to emptying these berries into the bucket, the dog was lying between him and me. He laid down there when we started to empty the berries. The next time I saw him was right at the tressle, just as he got on the edge of it he was running between the guard-rail and the rail. It was just a few seconds from the time I saw this dog there by us until I saw him going on the tressle." Clarence Bickle testified: - "When within five or six feet of the tressle I saw the dog running along the right-hand side of the track; he was bounding up on top of the tressle just in front of the side of the car. I had not seen the dog before that. When I first saw him I think he was running as fast as he could run in a northerly direction; about the first bound he made on the bridge his forefeet went up and his rear parts fell over the rail, and the car struck him." Witness also says that he built this car out of an old automobile, and that its maximum speed was twenty-two to twenty-three miles per hour, and denies that the Schmidts said to him to look out that he was going to hit the dog, or anything to that effect. ~~Taylor, an occupant of the car, also says that he heard no such statement made by the Schmidts. The evidence of Barney Russel is corroborative of the testimony of Bowen and Hennen as to where the dog was immediately prior to the accident. The only witness in this case who testified that this dog ran along the railroad track for some distance was Alois~~

was about four or five seconds from the time that he saw the dog sitting by Bowen until he saw him go under the car. Joe Hannen said: "When Mr. Bowen began to empty the three barrels into the bucket, the dog was lying between him and me. He laid down there when we started to empty the barrels. The next time I saw him was right at the trestle, just as he got on the edge of it he was running between the guard-rail and the rail. It was just a few seconds from the time I saw this dog there by us until I saw him going on the trestle." Clarence Hickle testified: "When within five or six feet of the trestle I saw the dog running along the right-hand side of the track; he was bounding up on top of the trestle just in front of the side of the car. I had not seen the dog before that. When I first saw him I think he was running as fast as he could run in a northerly direction; about the first bound he made on the bridge his forefeet went up and his rear parts fell over the rail and the car struck him."

Witness also says that he built this car out of an old automobile, and that its maximum speed was twenty-two to twenty-three miles per hour, and denies that the Schmidts said to him to look out that he was going to hit the dog, or anything to that effect. Taylor, an occupant of the car, also says that he heard no such statement made by the Schmidts. The evidence of Barney Russel is corroborative of the testimony of Bowen and Hannen as to where the dog was immediately prior to the accident. The only witness in this case who testified that this dog ran along the railroad track for some distance was Alois

Schmidt, who fixes the dog as having been in front of the car for a distance of about one hundred feet or more before it reached the tressle. He is contradicted in this by his brother, William Schmidt, a witness for appellee, by Bickle, Taylor and, to some extent, by Bowen, Hennen and Barney Russel; and as before stated, his testimony is further weakened by the contradictory statements made by him to Doctor Ferguson. We think it clearly appears from this evidence that the dog jumped in front of the car right at the trestle, at least not more than five or six feet before the car reached the tressle. The testimony tends to show that the car was being operated at from eighteen to twenty miles per hour, and while the testimony is somewhat conflicting as to the efforts made to stop the car as soon as the dog was seen upon the track, yet it is very clear from the testimony that there was no time to stop the car between the time the dog jumped upon the track and the accident. We are of the opinion that the defendant was not guilty of the negligence charged, and that the verdict of the jury is manifestly against the weight of the evidence, and that the judgment of the lower court should be reversed, and as this case has been in this Court twice in addition to another case growing out of the same state of facts and heretofore referred to, we are of the opinion that the case should be reversed without remanding.

Lawrence, who likes the dog, as having been in front of the car for a distance of about one hundred feet before being struck by the trestle. He testified in this by his brother, Julius Lawrence, witness for appellee, by Sheila Taylor and, in some extent, by Owen, Jerson and Bunny Russell, and as before stated, his testimony is further weakened by the unsatisfactory statements made by him to Doctor Ferguson. We think it clearly appears from this evidence that the dog jumped in front of the car right at the trestle, at least not more than five or six feet before the car reached the trestle. The testimony tends to show that the car was being operated at from eighteen to twenty miles per hour, and while the testimony is somewhat conflicting as to the efforts made to stop the car as soon as the dog was seen upon the track, yet it is very clear from the testimony that there was no time to stop the car between the time the dog jumped upon the track and the accident. We are of the opinion that the defendant was not guilty of the negligence charged, and that the verdict of the jury in manifestly against the weight of the evidence, and that the judgment of the lower court should be reversed, and as this case has been in this court twice on appeal to appellee, we, out of the same state of facts and therefore referred to, as one of the minority, that the case should be reversed without remanding.

Judgment reversed.

We make the following finding of facts in this case;-

That the defendant is not guilty of negligence as charged; and that the dog unexpectedly jumped before the car, and at a distance of not more than five or six feet from the tressle, and not more than ten or twelve feet from the place where the accident occurred.

(Not to be reported in full)

Upon consideration of a petition for rehearing in the above cause, the foregoing opinion is modified by striking out the finding of facts and all of the opinion after the word "evidence" in the 5th line from the bottom of the 6th page, and adding thereto the following:- "The judgment of the lower court will accordingly be reversed and the cause remanded.

REVERSED AND REMANDED.

Findings Proposed.

"e make the following finding of facts in this case:-

That the defendant is not guilty of negligence as charged; and that the deceased suddenly jumped before the car, and at a distance of not more than five or six feet from the tracks, and not more than ten or twelve feet from the place where the assistant motorman.

(not to be reported in full)

Upon consideration of a petition for rehearing in the above cause, the foregoing opinion is modified by striking out the finding of facts and all of the opinion after the word "evidence" in the 5th line from the bottom of the 6th page, and adding thereto the following:- "The judgment of the lower court will accordingly be reversed and the cause remanded.

REVERSED AND REMANDED.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 21st *day of* May, *A. D. 1915.*

C. C. Johnson

Clerk of the Appellate Court.

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the 21st *day of* July *A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

(October 1914)

196 I.A. 564

HEIRSCH & MICOTTO,
Appellees

vs.

No. 44
October Term, 1914.

LORIMER & GALLAGHER CO., &
O T. DUNLAP CO.,
Appellants.

~~ERROR TO~~
APPEAL FROM

CITY COURT

EAST ST. LOUIS ~~COUNTY~~

TRIAL JUDGE

HON. W. M. VANDEVENTER.

Term No. 44. Agenda No. 52.

IN THE APPELLATE COURT.

Fourth District.

October Term 1914.

HEIRSCH & MICOTTO Appellees .vs. LORIMER & GALLAGHER COMPANY and O. T. DUNLAP COMPANY, Appellants.	* Appeal from the City Court * of East St. Louis, Illinois.

McBRIDE, P. J.

Appellees recovered a judgment against appellants in the City Court of East St. Louis, Illinois for $1558.61. The action was in assumpsit, the declaration consisting of a single count, declaring specially on the following contract upon which appellees relied for a recovery:

State of Illinois :
County of St. Clair :; ss
City of East St. Louis:

In the City Court, January Term, 1913.

Heirsch & Micotto :
vs :: Assumpsit.
O. T. Dunlap Company :

"It is stipulated and agreed by and between the parties hereto that a mutual settlement of their accounts has been this day arrived at, and that there is due the plaintiffs on an account stated from the defendants by way of compromise and settlement, the sum of two thousand two hundred and forty-four dollars and sixty-one cents

Term No. 44. Agenda No. 52.

IN THE APPELLATE COURT.

Fourth District.

October Term 1914.

HEIRSON & MIGOTTO Appellees .vs. LOFLUNEN & GALLAGHER COMPANY and O. T. DUNLAP COMPANY, Appellants.	* Appeal from the City Court * of East St. Louis, Illinois.

MOTION T. 1.

Appellees recovered a judgment against appellants in the City Court of East St. Louis, Illinois for $1558.61. The action was in assumpsit, the declaration consisting of a single count, declaring specially on the following contract upon which appellees relied for a recovery:

State of Illinois :
County of St. Clair :; ss
City of East St. Louis:

In the City Court, January Term, 1912.

Heirson & Migotto :
:
vs :: Assumpsit.
:
O. T. Dunlap Company :

It is stipulated and agreed by and between the parties hereto that a mutual settlement of their accounts has been this day arrived at, and that there is due the plaintiffs on an account stated from the defendants by way of compromise and settlement, the sum of two thousand two hundred and forty-four dollars and sixty-one cents

($2,244.61), subject to the final acceptance of the work done by the plaintiffs under their contract with the O.T. Dunlap Company in building the sewer on St. Clair Avenue, East St. Louis, Ill., and in consideration of the mutual settlement made as hereinbefore stated the defendants agree to pay to the plaintiffs within the next few days the sum of six hundred and eighty-six dollars ($686.00) cash and to pay the balance of fifteen hundred and fifty-eight dollars and sixty-one cents ($1,558.61) immediately upon acceptance of such work done by the plaintiffs by the City of East St. Louis, and to exercise due diligence in an effort to have the final confirmation and approval of the work on the outlet sewer, including the portion done by the plaintiff, confirmed and accepted by the City of East St. Louis, Ill."

In Witness Whereof, the parties hereto have set their hands and seals this 25th day of January 1912.

Heirsch & Micotto
By D.E.Keefe, Their Attorney.
O.T.Dunlap Company and
Lorimer & Gallagher Company,
By Dan McGlynn, Their Attorney.

Appellants pleaded the general issue, and the parties agreed in open court that any evidence, admissible under any proper special plea, might be introduced under that plea. A jury was waived, and trial had before the Court.

The errors assigned are that the trial court erred in refusing certain propositions of law submitted by appellants, and erred in entering judgment in favor of appellees and against appellants.

Both parties agree that the material point involved in this appeal is the proper legal construction of of the contract sued on; and the particular point in con-

($4,346.01), subject to the final acceptance of the work done by the plaintiffs under their contract with the O.T. Dunlap Company in building the sewer on St. Clair Avenue, East St. Louis, Ill., and in consideration of the mutual settlement made as hereinbefore stated the defendants agree to pay to the plaintiffs within the next ten days the sum of six hundred and eighty-six dollars ($686.00) each and to pay the balance of itemized contract and thirty-eight dollars and eighty-one cents ($38.81) immediately upon acceptance of such work done by the plaintiffs by the City of East St. Louis, and to exercise due diligence in an effort to have the final confirmation and approval of the work on the outlet sewer, including the portion done by the plaintiff, confirmed and accepted by the City of East St. Louis, Ill."

In witness hereof, the parties hereto have set their hands and seals this 26th day of January 1915.

Hartwell & Hinkle
By D.E.Keefe, Their Attorney.
O.T.Dunlap Company and
Lorimer & Collins Construction Company,
By Dan McGlynn, Their Attorney.

Appellants pleaded the general issue, and the parties agreed in open court that any evidence, admissible under any proper special plea, might be introduced under that plea. A jury was waived, and trial had before the court.

The errors assigned are that the trial court erred in refusing certain propositions of law submitted by appellants, and erred in entering judgment in favor of appellees and against appellants.

Both parties agree that the material point involved in this appeal is the proper legal construction of of the contract sued on; and the particular point in con-

troversy is narrowed down as to the meaning which should be ascribed to the words: "subject to the final acceptance of the work done by the plaintiffs under their contract with the O. T. Dunlap Company in building the sewer on St. Clair Avenue, etc.," immediately following the statement of the amount stipulated to be due the plaintiffs.

Appellees insist that this expression merely fixed a time when payment of the balance of $1558.61, mentioned in the contract, was to be made to them; while appellants insist that "the acceptance of the work done by the plaintiffs" was a condition precedent; that the deferred payment was not to be made to them until the work, as done by them, was accepted by the City of East St. Louis as a performance of the original contract between the parties.

The primary object to be attained in the construction of a contract is to discover and give effect to the intention of the parties, so that the performance of the contract may be enforced according to the sense in which they mutually understood it at the time it was made. (Whalen vs. Stevens 193 Ill., 121.) And greater regard is to be had to the clear intent of the parties, than to any particular words which they may have used to express it. (Whalen vs Stevens, Supra; Minnesota Lumber Co. vs. Coal Co. 160 Ill., 85.) It is seldom, if ever, that a contract of the character sued on, will state upon its face, sufficient facts, so that the Court may, from a bare inspection of the instrument itself, know and understand the situation of the parties, and the facts and circumstances surrounding them at the time the contract was entered into. And when disputes arise as to the proper

Gateway is mirrored corn as to the meaning which should be ascribed to the words: "subject to the final approval of the work done by the [illegible] Elmer Thell [illegible] Corporation is waiving the same as to "this breach, viz., immediately following the expiration of the [illegible] eliminated to be the plaintiff. Appellees insist that this expectation merely fixed a time when payment of the balance of $1850.81, mentioned in the contract, was to be made to them; while appellants insist that "the acceptance of the work done by the plaintiff" was a condition precedent; that the deferred payment was not to be made to them until the work, as done by them, was accepted by the City of East St. Louis as a performance of the original contract between the parties.

The primary object to be attained in the construction of a contract is to discover and give effect to the intention of the parties, so that the performance of the contract may be enforced according to the rights they mutually understood it at the time it was made. ("Nolan vs. Stevens 183 Ill., 181.) And greater regard is to be had to the clear intent of the parties, than to any particular words which they may have used to express it. ("Nolan vs Stevens, Supra; Manessis Insurance Co. vs. Odal Co. 180 Ill., 30.) It is seldom, if ever, that a contract of the character made in, will state upon its face, sufficient facts, so that the Court may, from a mere inspection of the instrument itself, know and understand the situation of the parties, and the facts and circumstances surrounding them at the time the contract was entered into. And when disputes arise as to the proper

construction of contracts that are in their terms uncertain, it may be proper for the Court to hear extrinsic evidence of the facts and circumstances surrounding the parties, and of such facts as they had in view, so as to place itself, as nearly as possible in their position, that it may understand the language used in the sense intended by them. (Doyle vs. Teas 4 Scam.202; Barrett vs Stow 15 Ill.,428; Sigsworth vs. McIntyre 18 Ill.,126.)

In view of these authorities, it was proper for the parties to offer, and for the Court to hear extrinsic evidence of all of the facts and circumstances, leading to the execution of the contract in question, not for the purpose of changing or modifying the contract, but to enable the Court to arrive at the true intention of the parties, and enforce the contract accordingly.

It appears from the evidence that in 1909 appellants had a contract with the City of East St. Louis, Ill., for the construction of a Local Improvement consisting of an outlet sewer, and sub-let a portion of the work to appellees. Both appellants' contract with the City, and appellees' contract with appellants required that the work in question should be done in substantial compliance with the ordinance, plans and specifications therefor, and to the satisfaction of the Board of Local Improvements. Appellees' contract also provided that ten per cent of the amount due them should be retained by appellants, until the final completion of the work.

It also appears from the evidence that appellees entered upon the execution of their contract, and claim to have completed the work therein described. Having failed to obtain settlement therefor, appellees sued appellants at the September Term 1911 of the City Court of East St.

construction contracts that are in their nature [illegible] certain, it may be proper for the Court to hear extrinsic evidence of the facts and circumstances surrounding the parties, and of such facts as they had in view, so as to place itself, as nearly as possible in their position, that it may understand the language used in the sense intended by them. (Doyle vs. Tass & Sons.202; Barrett vs Stow. 15 Ill.,429; Bigsworth vs. McIntyre 18 Ill.,126.)

In view of these authorities, it was proper for the parties to offer, and for the Court to hear extrinsic evidence of all of the facts and circumstances, leading to the execution of the contract in question, not for the purpose of changing or modifying the contract, but to enable the Court to arrive at the true intention of the parties, as evidence the contract accordingly.

It appears from the evidence that in 1909 appellants had a contract with the City of East St. Louis, Ill., for the construction of a Local Improvement consisting of an outlet sewer, and sub-let a portion of the work to appellees. This appellees' contract with the City, and appellees' contract with appellants required that the work in question should be done in substantial compliance with the ordinance, plans and specifications thereof, and to the satisfaction of the Board of Local Improvements. Appellees' contract also provided that the [illegible] amount due them should be retained by appellants, until the final completion of the work.

It also appears from the evidence that appellees entered upon the execution of their contract, and claim to have completed the work therein described. Having failed to receive satisfaction, appellees sued appellants at the September Term 1911 of the City Court of East St.

Louis, for the full amount claimed by them to be due under their contract with appellants. One Count of their declaration in that suit declared specially upon the original contract between the parties, and in the statement of account filed with that declaration, the gross amount alleged to have been earned by appellees under their contract is $1565.16; and the net amount, alleged to be then due was the sum of $2576.16.

It further appears from the evidence that appellees' part of the work on this outlet sewer had not been accepted by the City, on, or at any time prior to the 25th day of January 1912, -nor was it ever afterwards accepted, in the condition in which appellees finally left it.

With the contractual relations of the parties in this condition, and with a suit pending upon the original contract, the instrument sued on was executed.

Reading this instrument in the light of the circumstances surrounding the parties at the time of its execution, it cannot reasonably be said that appellees expected to receive pay in full for the work done by them, until and unless that work was accepted by the City; nor can it reasonably be said that appellants expected to pay therefor, in full, until and unless it had been so accepted. Such a conclusion is in harmony with the original contract between the parties. Assuming that appellees' work would be accepted by the City, the parties could themselves agree what sum was to be paid therefor; but, inasmuch as the City had not, at the time this agreement was signed, passed upon the work, neither party then knew what its decision would ultimately be. Whether or

not the City would eventually accept appellees' work was an uncertain matter which the future alone would determine.

We hold, therefore, that the instrument sued on does not provide that there is due appellees $3244.61, absolutely and without condition, but that said sum is due "subject to the final acceptance of the work done by plaintiffs under their contract with O. T. Dunlap Company in building the sewer on St. Clair Avenue, East St. Louis, Illinois." As a condition precedent to a right of recovery of the deferred payment under this agreement, we regard it essential for appellees to show, by their evidence, that the work as done by them, was finally accepted by the City. This they failed to do. To hold otherwise would be doing violence to the language used, and we would be forced to disregard all that is said in this instrument with reference to the "acceptance of the work". In construing contracts the whole instrument must be considered and so construed, if possible, as to give force and meaning to every part of it. (Holmes vs Bemis, 12_4 Ill., 453; Hayes vs O'Brien 149 Ill., 403; Richmond vs. Brandt 118 Ill., App. 624.)

Another circumstance supporting our conclusion is the fact that in the original contract between the parties, ten per cent of the moneys due appellees was to be retained until the final acceptance of the work as a whole. While it is not expressly stated in the contract why this amount is retained, we think the implication is clear that it is to be retained as a guarantee against defective workmanship or materials, and to reimburse appellants, in case appellees' work was not accepted.

was the City would eventually accept unqualified such as an uncertain matter which the lower courts could determine.

We hold, therefore, that the instrument sued on does not provide that there is due appellees $2264.81, absolutely and without condition, but that said sum is due "subject to the final acceptance of the work done by plaintiffs under their contract with O. T. Dunlap Company in building the sewer on St. Clair Avenue, East St. Louis, Illinois." As a condition precedent to a right of recovery of the deferred payment under this agreement, we regard it essential for appellees to show, by their evidence, that the work in question was finally accepted by the City. This they failed to do. To hold otherwise would be doing violence to the language used, and we would be forced to disregard all that is said in this instrument with reference to the "acceptance of the work". In construing contracts the whole instrument must be considered and so construed, if possible, as to give force and meaning to every part of it. (McInnes vs. Smith, 19 A. App. 459; Hayes vs. O'Brien 142 Ill., 400; Richmond vs. Brown 142 Ill., App. 494.)

Another circumstance supporting our conclusion is the fact that in the original contract between the parties, ten per cent of the money due appellees was to be retained until the final acceptance of the work as a whole. While it is not expressly stated in the contract why this amount is retained, we think the implication is clear that it is to be retained as a guarantee against defective workmanship or materials, and to reimburse appellants, in case appellees' work was not satisfactory.

The deferred payment in the contract sued on, lacks but very little in being ten per cent of the gross sum which appellees claimed they had earned under their original contract. It is peculiar also if the deferred payment in question was to be paid absolutely and without condition, why the parties did not fix upon a date certain for its payment, rather than make such payment depend upon the happening of an uncertain future event, viz; "upon the acceptance of such work done by plaintiffs", by the City of East St. Louis.

The evidence in this case tends to show that the work in question, as "done by plaintiffs" never was accepted by the City. The work that was finally "accepted by the City of East St. Louis",represented certain work done by plaintiffs, together with certain repairs, changes and alterations made by appellants. The evidence tends to show that when "the work done by plaintiffs" was examined by the City, it refused to accept it, and so notified appellants. Appellants in turn notified appellees, and requested them to make the necessary repairs and alterations. This, appellees refused to do. In order to procure the acceptance of the work in question, appellants were required to do a considerable amount of work, and expend a considerable sum of money. In the trial court, appellant sought to set off or recoup the sum so expended against the appellees' demand, but the court refused to consider the same. In this there was error.

Appellant having incurred this expense in correcting defects in the work which appellees had contracted to do, in order to procure the acceptance of such

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the happening of an uncertain future event, viz: "upon
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The evidence in this case tends to show that
the work in question, as "done by plaintiffs" never was
accepted by the City. The work that was finally "accepted
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done by plaintiffs, including also extra or inferior, changes
and alterations made by appellants. The evidence tends
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were required to do a considerable amount of work, and
expend a considerable sum of money. In the trial court,
appellant sought to set off or recoup the sum so expended
against the appellees' demand, but the court refused to
consider the same. In this there was error.

Appellant having incurred this expense in
correcting defects in the work which appellees had con-
tracted to do, in order to procure the acceptance of such

work, the amount so expended constitutes money laid out and expended for the benefit of appellees, and appellants had a right to set off or recoup the amount necessarily expended by them, as against any demand of appellees.

The second, third and fourth propositions of law submitted by appellants were in harmony with the views herein expressed, and should have been held by the Court as the law, and it was error to refuse the same.

Under the view we take of this case, the Court erred in findingtthe issues for appellees, and in entering judgment thereon, and erred also in refusing to hold as the law, the second, third and fourth propositions above referred to.

For these reasons the judgment is reversed and the cause remanded.

(Not to be reported in full)

[illegible], the amount so expended constitutes money laid out and expended for the benefit of appellees, and appellants had a right to set off or recoup the amount necessarily expended by them, as against any legend of appellees.

The second, third and fourth propositions of law submitted by appellants were in harmony with the views herein expressed, and should have been held by the Court as the law, and it was error to refuse the same.

Under the view we take of this case, the Court erred in finding the issues for appellees, and in entering judgment thereon, and erred also in refusing to hold as the law, the second, third and fourth propositions above referred to.

For these reasons the judgment is reversed and the cause remanded.

(Not to be reported in full)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 21st *day of* May *A. D. 1915.*

C. C. Johnson

Clerk of the Appellate Court.

OPINION

1202

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the ------1st------ *day of* ~~*May*~~ Sept. *A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

(March 1915)

196 I. A. 569

Eli Conant,

Plaintiff in error.

vs.

No. 11

October Term, 1914.

Lloyd Watts,

Defendant in error.

~~ERROR TO~~
APPEAL FROM

County COURT

Marion COUNTY

TRIAL JUDGE

HON. C. E. JENNINGS.

Term No. 11. In the Appellate Court. Agenda No.67.

Fourth District.

October Term A. D. 1914.

Eli Conant, Plaintiff in error.	)	
vs.	)	Error from the County Court
Lloyd Watts, Defendant in error.	)	of Marion County.

McBride, P. J.

This suit was originally brought by Lloyd Watts against Eli Conant before a Police Magistrate in Marion County to recover the amount of eight dollars claimed to be due from the defendant to the plaintiff. On January 25, 1913, a trial was had before such Police Magistrate and a jury summoned, which resulted in a verdict in favor of the defendant Eli Conant. The Magistrate failed to enter any judgment upon this verdict. The entry upon his docket, after reciting the issuance of process for defendant and for witnesses, and the venire for a jury then states; "The parties and witnesses were sworn and after hearing the testimony jury returned the following verdict, "We, the jury, find for the defendant". This is all of the entry made by the Justice of the Peace upon his docket. Thereafter Lloyd Watts filed an appeal bond with the Police Magistrate which was approved and the papers together with the transcript of the docket

Term No. 11. In the Appellate Court. Agenda No.67.

Fourth District.

October Term A. D. 1914.

Mil Conant, Plaintiff in error.	
vs.	Error from the County Court
Lloyd Watts, Defendant in error.	of Marion County.

Lefkride, J. J.

This suit was originally brought by Lloyd Watts against Mil Conant before a Police Magistrate in Marion County to recover the amount of eight dollars claimed to be due from the defendant to the plaintiff. On January 25, 1913, a trial was had before such Police Magistrate and a jury summoned, which resulted in a verdict in favor of the defendant Mil Conant. The Magistrate failed to enter any judgment upon this verdict. The entry upon his docket, after recitING the issuance of process for defendant and for witnesses, and the venire for a jury then states; "The parties and witnesses were sworn and after hearing the testimony jury returned the following verdict, "We, the jury, find for the defendant". This is all of the entry made by the Justice of the Peace upon his docket. Thereafter Lloyd Watts filed an appeal bond with the Police Magistrate which was approved and the papers together with the transcript of the docket

was transmitted to the County Court of Marion County. At the March Term, 1913, of said court, the defendant Eli Conant entered a motion to dismiss the appeal for the reason that no judgment had been entered before the Justice of the Peace, and the County Court did not have any jurisdiction of the cause, and thereafter and at the November Term of the Said Court it was ordered and adjudged by the said court that the said motion be and the same is hereby denied. To the making of said order the defendant Conant excepted and to reverse which prosecutes this writ of error. The statute makes it the duty of the Police Magistrate upon a trial had before him that he "Shall thereupon give judgment against the party who shall be proved to be indebted to the other for so much money in dollars and cents as shall appear to be due, including such interest as is allowed by law, and costs of suit, or for the amount of damages proved, but if neither party shall be indebted or no damages proved the judgment shall be against the plaintiff for the costs of suit. Hurds Revised Statutes Chap. 79, Sec. 39. The Justice failed to render any judgment upon this verdict, which was necessary before any appeal could be prosecuted therefrom or before the Appellate Court could acquire jurisdiction. It is said in the case of Church vs. Stunkard, 101 App., 148, in an opinion delivered by Justice Harker, that, "The only question involved in this case is whether an appeal may be prosecuted from the verdict of a jury

was transmitted to the County Court of Marion County.

At the March Term, 1913, of said court, the defendant in Counsel entered a motion to dismiss the appeal for the reason that no judgment had been entered before the Justice of the Peace, and the County Court did not have any jurisdiction of the cause, and thereafter and at the November Term of the said Court it was ordered and adjudged by the said court that the said motion be and the same is hereby denied. To the making of said order the defendant Counsel excepted and to reverse which proceeds this writ of error. The statute makes it the duty of the Police Magistrate upon a trial had before him that he "shall thereupon give judgment against the party who shall be proved to be indebted to the other for so much money in dollars and cents as shall appear to be due, including such interest as is allowed by law, and costs of suit, or for the amount of damages proved, but if neither party shall be indebted or no damages proved the judgment shall be against the plaintiff for the costs of suit. Hurds Revised Statute, Chap. 79, Sec. 39. The Justice failed to render any judgment upon this verdict, which was necessary before any appeal could be prosecuted therefrom or before the Appellate Court could acquire jurisdiction. It is said in the case of Church vs. Stanhard, 101 App., 148, in an opinion delivered by Justice Parker, that, "The only question involved in this case is whether an appeal may be prosecuted from the verdict of a jury

before a justice of the peace. The authority for taking appeals from justices of the peace to higher courts is purely statutory and can be executed only in the manner prescribed by the statute. The statute only provides that appeals may be taken from judgments rendered by justices and not from verdicts of juries in cases tried before them. No formal words are required of a justice in entering a judgment, but it is necessary that some kind of a judgment be entered; otherwise there is nothing to appeal from, and the court appealed to acquires no jurisdiction of the case. In this case the justice did not attempt to enter a judgment on the verdict of the jury, and the court should have sustained appellant's motion to dismiss the appeal". We think this case is decisive of the question now presented for our consideration and that the County Court was in error in refusing to dismiss the appeal upon the defendant's motion.

It further appears from the record filed herein that thereafter the County Court proceeded to render judgment against the defendant Eli Conant for eight dollars and costs of suit, and we are of the opinion that the court had no jurisdiction to enter such judgment.

The judgment of the County Court will be reversed and the cause remanded with directions to dismiss the appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of* ~~May~~ Sept. *A. D. 1915.*

C. C. Johnson

Clerk of the Appellate Court.

NION

1203

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the 1st *day of* Sept. *A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

(October term, 1914)

Sallie G. Owens,

Appellant.

vs.

No. 25.

October Term, 1914.

Commonwealth TrustCompany and

William G. Hume,

Appellees.

196 I.A. 571

~~ERROR TO~~

APPEAL FROM

Circuit COURT

Marion. COUNTY

TRIAL JUDGE

HON. ALBERT M. ROSE.

Term No. 25. In the Appellate Court. Agenda No.58.

Fourth District.

October Term, A. D. 1914.

Sallie G. Owens, Appellant.	
vs.	Appeal from the Marion County Circuit Court.
Commonwealth Trust Company, and William G. Hume, Appellees.	

McBride, P. J.

This is a bill filed by the complainant to redeem the lands described therein from a foreclosure sale after the expiration of twelve months.

It appears from the record in this case that on July 1, 1911, the lands described in complainant's bill were sold by the master-in-chancery of Marion county, under a foreclosure of a mortgage. That on June 29, 1912 the appellant undertook to redeem the said premises from said sale and made a tender of the amount due to the then holders of the said certificate of purchase, which was by them refused. The cause was heard in the Circuit Court of Marion County and a decree rendered dismissing appellant's bill and upon appeal to the Appellate Court of the Fourth District

Term No. 25. In the Appellate Court. Agenda No.38.

Fourth District.

October Term, A. D. 1914.

Sallie G. Owens, Appellant.	
vs.	Appeal from the Marion County Circuit Court.
Commonwealth Trust Company, and William G. Hume, Appellees.	

Schrider, J. 1.

This is a bill filed by the complainant to redeem the lands described therein from a foreclosure sale after the expiration of twelve months.

It appears from the record in this case that on July 1, 1911, the lands described in complainant's bill were sold by the master-in-chancery of Marion county, under a foreclosure of a mortgage. That on June 29, 1912 the appellant undertook to redeem the said premises from said sale and made a tender of the amount due to the then holders of the said certificate of purchase, which was by them refused. The cause was heard in the Circuit Court of Marion County and a decree rendered dismissing appellant's bill and upon appeal to the Appellate Court of the Fourth District

such decree was reversed and the cause remanded; the Appellate Court holding that owing to the tender, as shown by the evidence that was made on June 29, 1912, her right to redeem was not lost by the expiration of the twelve months. For a complete statement of the case and the decision rendered by this court, reference is made to the case of Owens vs. Commonwealth Trust Company, 183 Ill., App., 605.

Upon the remanding of said cause one W. H. Owens was permitted by the court to enter his appearance and file an answer herein, it being claimed by him that the Commonwealth Trust Company held this certificate of purchase as security and that it was owned by him subject to the interests of the Commonwealth Trust Company, and it was sought by this answer to fix the interests of himself and the Commonwealth Trust Company in this fund when redemption should be made. Appellant by her motion sought to set aside the order of the court permitting Hume to become a party defendant, and answer herein. This motion, however, was denied and the cause was then heard upon the bill, answers of the several defendants and the evidence, produced in court, and a decree was rendered by the court granting unto appellant four months within which to redeem said land, upon the payment to the master, or persons interested, by the appellant, of the amount of said foreclosure sale, together with legal interest thereon from June 29th, 1912 (this being the time tender was made), together with the amount paid out

such decree was reversed and the cause remanded;

the Appellate Court holding that owing to the tender, as shown by the evidence that was made on June 25, 1911, her right to redeem was not lost by the expiration of the twelve months. For a complete statement of the case and the decision rendered by this court, reference is made to the case of Owens v. Commonwealth Trust Company, 183 Ill., App., 605.

Upon the remanding of said cause one R. Owens was permitted by the court to enter his appearance and file an answer herein, it being claimed by him that the Commonwealth Trust Company held this certificate of purchase as security and that it was owned by him subject to the interests of the Commonwealth Trust Company, and it was sought by this answer to fix the interest of himself and the Commonwealth Trust Company in this fund when redemption should be made. Upon motion by her motion sought to set aside the order of the court permitting Owens to become a party defendant, and answer herein. This motion, however, was denied and the cause was then heard upon the bill, answers of the several defendants and the evidence produced in court, and a decree was rendered by the court granting said complainant four months within which to redeem said land, upon the payment to the master, or persons interested, by the complainant, of the amount of said foreclosure sale, together with legal interest thereon from June 29th, 1912 (this being the time tender was made), together with the amount paid out

for taxes, with legal interest, ~~thereon~~. The decree was rendered on February 25, 1914, ~~and appellant was given four months from that date within which to redeem~~ and it is from this decree that she prosecutes this appeal.

Of the many errors assigned a few only have been argued and we deem it only necessary to consider those argued by the appellant, which, as we believe, present the material matters at issue in this case. It is first objected by appellant that the decree was filed, as appears by the record, on February 25, 1914, but that it was in fact filed on May 2, 1914. The record discloses that a hearing of this case was had in the Circuit Court on February 25, 1914, and it further appears by the record that it was upon this date that the decree was filedand approved by the court and there is nothing in the record to sustain the contention of appellant that the decree was filed at a later date. This, however, could make no difference with the appellant's rights as they were fixed by a specified date and the four months within which to redeem was based upon the 25th day of February, 1914. It is claimed by appellant that this in fact shortens the time in which she had a right to redeem. We think under the circumstances the court was very liberal in its extention of time to redeem, for the reason that it was claimed by appellant that she had made a tender of the money on June 29, 1912, and for appellant to

reap the benefit of this tender it was necessary that it be kept good, and the presumption was that she had the money to pay for the redemption on the date of the hearing. We cannot see that any error is committed in this respect.

It is next insisted by Appellant that the Amount required to be paid by her to redeem the land was excessive. In this we think she is mistaken as the decree only required her to pay into court the amount that she had tendered on June 29, 1912, without interest to the date of hearing, and also required her to pay, in addition to this, the taxes that had been paid out to protect the land from a tax sale, with legal interest thereon & the total amount of the purchase price with interest up to the time of the tender, taxes paid, and interest thereon, was $11,364.17, and we can see no reason why she should not pay this amount in the necessary and proper redemption of this property. It has been held by the Supreme Court of this state, and we deem it to be a just and equitable rule, that wherea person has paid out taxes to protect the title, that in a redemption, when made and permitted under the order of the court, that it is just and equitable that taxes advanced be repaid.

The next point argued by appellant is, that the court erred in permitting W. G. Hume to become a party defendant to this bill and file an answer herein. It appears from the evidence that the Commonwealth Trust Company held the title to this certificate of purchase as collateral security, for the loan of $9,500.00 and that the lands were bid off at the sale by W. G. Hume for the sum of $10,191.93, and that the

reap the benefit of this tender it was necessary that it be kept good, and the presumption was that she had the money to pay for the redemption on the date of the hearing. We cannot see that any error is committed in this respect.

It is next insisted by Appellant that the amount required to be paid by her to redeem the land was excessive. In this we think she is justified as the decree only required her to pay into court the amount that she had tendered on June 20, 1917, without interest to the date of hearing, and was required her to pay, in addition to this, the taxes that had been paid due to project the land from a tax sale, with legal interest up to the time of the tender, taxes paid, and interest thereon, was $11,364.17, and we can see no reason why she should not pay this amount in the necessary and proper redemption of this property. It has been held by the Supreme Court of this state, and we deem it to be a just and equitable rule, that where persons have paid out taxes to protect the title, that in a redemption, when made and permitted under the order of the court, that it is just and equitable that taxes advanced be repaid.

The next point stated by appellant is, that the court erred in permitting W. C. Lane to become a party defendant to this bill and file an answer herein. It appears from the evidence that the Lane Mining Trust Company said the title to this quarrion is at purchase as collateral security, for the loan of $9,500.00 and that the lands were bid off at the sale by W. C. Lane for the sum of $10,191.93, and that the

balance of the purchase price was furnished by Hume. It also appears that the taxes paid out by Hume in 1911-1912-1913 with interest thereon amounted to $560.73, and this answer was filed for the purpose of presenting to the court for determination the respective rights of William G. Hume and the Commonwealth Trust Company to this fund when redemption was made but it did not in any manner effect the rights of appellant or the amount required to be paid by her for redemption. No complaint is made by Hume or the Commonwealth Trust Company as to the distribution of this fund between them, and if they do not complain the appellant certainly has no right to. We donot believe that the court committed any error of which the appellant can complain in distributing this fund.

While many errors have been assigned, and quite a lengthy brief presented by appellant in this case, we believe that the propositions above discussed cover the material matters presented.

After considering this whole record we are satisfied that the appellant had a fair hearing and that a just decree was rendered in this cause. The time for redemption was liberal, under the circumstances, and we believe that she was given ample time to redeem the property, and that the amount required to be paid by her in the redemption was reasonable and proper. We are unable to say that the court

balance of the purchase price was furnished by Hume.

It also appears that the taxes paid out by Hume in 1911-1912-1913 with interest thereon amounted to $860.73, and this answer was filed for the purpose of presenting to the court for determination the respective rights of William C. Hume and the Commonwealth Trust Company in this land when redemption was made but it did not in any manner affect the rights of appellant as the amount required to be paid by her for redemption. No complaint is made by Hume or the Commonwealth Trust Company as to the distribution of this fund between them, and if they do not complain the appellant certainly has no right to. We doubt believe that the court committed any error of which the appellant can complain in distributing this land.

While many errors have been assigned, and quite a lengthy brief presented by appellant in this case, we believe that the propositions above discussed cover the material matters presented.

After considering this whole record we are satisfied that the appellant had a fair hearing and that a just decree was rendered in this cause. The time for redemption was liberal, under the circumstances, and we believe that she was given ample time to redeem the property, and that the amount required to be paid by her in the redemption was reasonable and proper. We are unable to say that the court

committed any reversible error in the hearing of this cause or in reaching its conclusions herein, and the judgment and decree of the lower court is affirmed.

JUDGMENT AND DECREE AFFIRMED.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of May, A. D. 1915.*

C. C. Johnson,

Clerk of the Appellate Court.

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen,

Present:

Hon. Harry Higbee, Presiding Justice,
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the 1st *day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

196 I.A. 593

Eugene Thompson
Appellee

vs.

No. 7

March Term, 1915

Harry B. Russell et al
Appellants

~~ERROR TO~~
APPEAL FROM

Circuit COURT

St Clair COUNTY

TRIAL JUDGE

HON. Geo. A. Crow

Term No. 7. Agenda No.1.

March Term, 1915.

Eugene Thompson, Appellee. Vs. Harry B. Russell, et.al., Appellants.	Appeal from St.Clair.

Opinion by Higbee, P. J.

Appellee, Eugene Thompson, entered into a written lease with appellants, Harry B. Russell and his wife Mamie Russell, of certain farm lands in St. Clair County, Illinois, on December 1st, 1911, for a term of three years, to begin March 12, 1912.

The lease provided, in substance, ~~among other things~~ that, (1) the young fruit trees on the farm should be ~~given proper attention~~ cared for by the party of the second part, ~~and that he~~ should be trimmed and cultivated ~~them~~ under the direction of the party of the first part, ~~and see~~ so that no harm came to them; (2) "If desired by party of the first part, party of the second part must haul, free of charge to party of the first part, lime stone or fertilizing material and spread it at the points on the farm designated by the party of the first part," (3) "If underbrush and trees are found growing along ditches on this farm which could be otherwise crossed by machinery, said underbrush and trees said party of the second part agrees to grub and chop out as rapidly as

Term No. 7. Agenda No.1.

March Term, 1915.

Eugene Thompson, Appellee.	
Vs.	Appeal from St.Clair.
Harry B. Russell, et.al., Appellants.	

Opinion by Higbee, P. J.

Appellee, Eugene Thompson, entered into a written lease with appellants, Harry B. Russell and his wife Tamie Russell, of certain farm lands in St. Clair County, Illinois, on December 1st, 1911, for a term of three years, to begin March 12, 1912.

The lease provided, ~~among other things~~ that, (1) the young fruit trees on the farm should be given proper attention by the party of the second part, ~~and that he~~ should trim and cultivate them under the direction of the party of the first part, ~~and set~~ that no harm came to them; (2) "If desired by party of the first part, party of the second part must haul, free of charge to party of the first part, lime stone or fertilizing material and spread it at the points on the farm designated by the party of the first part," (3) "If underbrush and trees are found growing along ditches on this farm which could be otherwise crossed by machinery, said underbrush and trees said party of the second part agrees to grub and chop out as rapidly as

possible."

Differences arose between the parties to the lease and on October 7, 1913, appellee served a notice upon appellants to quit and deliver up possession of the premises, on or before October 18, A. D. 1913, alleging that appellants had made default in the terms of the lease, and assigning among other reasons therefor the following: Because of your failure to work said leased premises set apart as wheat ground for the crop of 1913, in a proper and husbandlike manner; because of your failure to haul to the farm and make distribution of fertilizer material provided by said owner, for distribution on said land during the season of 1913, and because of the failure to distribute said fertilizer material in accordance with written directions of said owner; because of your failure and refusal to chop and clear out ditches on said premises of trees and undergrowth; and, "because of your failure to spread fertilizer material around and cultivate the growing fruit trees on said leased premises.

Appellants did not deliver up possession of the premises at the expiration of the time named, and a suit in forcible detainer was commenced against thembefore a justice of the peace by appellee. A trial was had before the justice and an appeal taken to the circuit court of St. Clair County, where another trial resulted in a verdict of the jury and judgment in favor of appellee.

Appellants contend that the proofs failed

possible.*

Differences arose between the parties to the lease and on October 7, 1913, appellee served a notice upon appellants to quit and deliver up possession of the premises, on or before October 14, A. D. 1913, alleging that appellants had made default in the terms of the lease, and requiring appellants therein the following:

"Because of your failure to work said premises set apart as wheat ground for the crop of 1913, in a proper and husbandlike manner;

Because of your failure to haul to the farm and make distribution of fertilizer material provided by said owner, for distribution on said land during the season of 1913, and because of the failure to distribute said fertilizer material in accordance with written directions of said owner;

Because of your failure and refusal to chop and clear out ditches on said premises of trees and undergrowth; and, Because of your failure to spread fertilizer material around and cultivate the growing fruit trees on said lease premises."

Appellants did not deliver up possession of the premises at the expiration of the time named, and a suit in forcible detainer was commenced against themberfore a justice of the peace by appellee. A trial was had before the justice and an appeal taken to the circuit court of St. Clair County, where another trial resulted in a verdict of the jury and judgment in favor of appellee.

Appellants contend that the proofs failed

to show the charges made against them of default in the terms of the lease and therefore the verdict of the jury and subsequent judgment should not have been in favor of appellee; also that the court erred in giving an instruction presented by appellee. ~~Upon~~ At the trial the ~~appellants~~ defendants offered the following instruction as their theory of the issues ~~to be determined by the jury~~, which was given ~~by the court~~: "The court instructs the jury that the only issues before you for your determination are: 1st. Whether or not defendants failed to work the portion of the premises set apart for wheat for the season of 1914, in a proper and husbandlike manner; and

2nd; Whether or not defendants failed to haulandistribute fertilizing material, as provided by the lease; and

3rd. Whether or not defendants refused or failed to clear and chop underbrush and trees on and along the ditches, according to the lease; and

4th. Whether or not the defendants refused or failed to spread or throw manure around the trees in the orchard.

If you believe from the preponderance of all the evidence, that the plaintiff has not shown that the defendants did fail or refuse to do some one or more of the above mentioned things, then you should find the issues in favor of the defendants."

This instruction of appellants appears to

to show the charges made against them of default in the terms of the lease and therefore the verdict of the jury and subsequent judgment should not have been in favor of appellee; also that the court erred in giving an instruction presented by appellee. Upon the trial the appellants filed the following instruction as their theory of the issues to be determined by the jury, which was given by the court: "The court instructs the jury that the only issues before you for your determination are:

1st. Whether or not defendants failed to work the portion of the premises set apart for wheat for the season of 1914, in a proper and husbandlike manner; and

2nd; Whether or not defendants failed to manland distribute fertilizing material, as provided by the lease; and

3rd. Whether or not defendants refused or failed to clear and chop underbrush and trees on and along the ditches, according to the lease; and

4th. Whether or not the defendants refused or failed to spread or throw manure around the trees in the orchard.

If you believe from the preponderance of all the evidence, that the plaintiff has not shown that the defendants did fail or refuse to do some one or more of the above mentioned things, then you should find the issues in favor of the defendants."

This instruction of appellants appears to

fairly present the issues of fact to be determined by the jury under the proofs, and they are of course bound to adhere to the issues so presented by them.

It appeared ~~from the proofs~~ that ~~appell-ant~~ defendant Harry B. Russel was engaged in ~~the printing broker~~ business ~~having his place of business~~ in St. Louis, Missouri and that he and his wife, Mamie Russell rented the farm with the intention that the wife and their son, Harry Russell, Jr., ~~who was~~ eighteen years of age at the time ~~the suit was~~ tried, should manage the farm; that neither the lessees nor their son ~~Harry~~ had had any actual experience in farming prior to the leasing of this farm. After the lease was made, the Russells ~~moved~~ upon the farm ~~and made it~~ their home. ~~Appellant~~ defendant Harry B. Russell, ~~however~~ continued ~~to carry on his business~~ in St. Louis and the farm was managed by the wife and son. ~~Appellee~~ plaintiff introduced proof tending to show that the wheat ground was not properly prepared in 1913 for the ~~wheat~~ crop of 1914, while there was proof on the part of ~~appellants~~ defendants that the premises set apart for wheat for the season of 1914, were properly cultivated and prepared for the crop. The proof showed without contradiction that ~~appellee~~ plaintiff shipped to ~~appellants~~ defendants for use upon the farm, a carload of manure, which ~~appellants~~ defendants failed to ~~have~~ haul~~ed~~ out to the farm and distributed as provided ~~for~~ by the lease; also that ~~appellant himself~~ had to ~~employ some one to haul~~ have this fertilizing material hauled to the farm for

fairly present the issue of fact to be determined by the jury under the proofs, and they are of course bound to adhere to the issue so presented by them.

It appeared from the proofs that appellant Harry E. Russell was engaged in the erection brewer business having his place of business in St. Louis, Missouri and that he and his wife, Maggie Russell rented the farm with the intention that the wife and their son, Harry Russell, Jr., who was eighteen years of age at the time the suit was tried, should manage the farm; that neither the lessee nor their son Harry had had any actual experience in farming prior to the leasing of this farm. After the lease was made, the Russellfamily moved on the farm and made it their home. Appellant Harry E. Russell, however continued to carry on his business in St. Louis and the farm was managed by the wife and son. Appellee introduced proof tending to show that the wheat ground was not properly prepared in 1913 for the wheat crop of 1914, while there was proof on the part of appellants that the premises set apart for wheat for the season of 1914, were properly cultivated and prepared for the crop. The proof showed without contradiction that appellee showed to appellants for use upon the farm, a carload of manure, which appellants failed to have hauled out to the farm and distributed as provided for by the lease; also that appellant himself had to employ some one to haul this fertilizing material to the farm for

distribution. The excuse offered by ~~appellees~~ defendants for ~~this~~ failure to haul and distribute the manure is that it was provided at a time when it was unreasonable for them to do so ~~and~~ the lease ~~did~~ not fix, by the time ~~when it should be hauled~~ for hauling. The proof further showed that the underbrush and trees ~~growing~~ along the ditches, were not cut or grubbed but there was proof on the part of ~~appellants~~ defendants tending strongly to show that the ditches, even if cleared of trees and undergrowth would be impassable for farm machinery.

~~Upon the question~~ As to whether ~~appellants~~ defendants refused or failed to spread the materials furnished them around the trees in the orchard, the proof of ~~the respective parties~~ did not agree. From what is above said it will appear that there was a controversy in the proofs which must properly be left to a jury to determine and as they have determined the matter and decided where the preponderance lay, we are not disposed or authorized to interfere with their verdict. The complaint of appellant concerning the instruction given for appellee is that it is involved and assumes that appellants violated some terms of the lease but an examination of the same does not indicate to us that the propositions presented are involved, nor does the instruction appear to us to assume that appellants had violated any of the terms of the lease, but on the contrary that question of fact appears to be plainly left to

distribution. The excuse offered by appellees for failure to haul and distribute the manure is that it was provided at a time when it was unreasonable for them to do so and the lease did not fix the time when it should be hauled. The proof further showed that the underbrush and trees growing along the ditches, were not cut or grubbed but there was proof on the part of appellants tending strongly to show that the ditches, even if cleaned of trees and undergrowth would be impassable for farm machinery.

[illegible]

refused or failed to spread the materials furnished them around the trees in the orchard, the proof of the respective parties did not agree. Even what is there said it will appear that there was a controversy in the proofs which must properly be left to a jury to determine and as they have determined the matter and decided where the preponderance lay, we are not disposed or authorized to interfere with their verdict. The complaint of appellant concerning the instruction given for appellee is that it is involved and assumes that appellants violated some terms of the lease but an examination of the same does not indicate to us that the propositions presented are involved, nor does the instruction appear to us to assume that appellants had violated any of the terms of the lease, but on the contrary that question of fact appears to be plainly left to

the jury for their determination.

The record discloses no substantial reason for reversing the judgment in this case and the same is therefore affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of December, A. D. 1915.*

C. C. Johnson

Clerk of the Appellate Court.

PINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the 1st *day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

196 I.A. 597

James R. Posey
Appellant

vs.

No. 11

March Term, 1915

Bank of Mt. et al
Appellees

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Marion COUNTY

TRIAL JUDGE

HON. James C. McBride

Term No. 11. Agenda No. 8

March Term, 1918.

James M. Leacy, Appellant, vs. Commissioners of Highways, et.al., Appellees.	Appeal from Marion.

Opinion by Higbee, P. J.

Appellant filed this bill in chancery, to restrain appellees from encroaching on his lands, removing his fences and cutting his trees, along certain roads and also to restrain them from further proceeding with a suit at law then pending, wherein appellees sought to prosecute him for obstructing certain highways. Appellee, William J. Spencer, is a rural mail carrier, and appears to have been made a defendant in said bill, on account of his traveling over portions of the highways in question, which were in dispute. He has no real interest in the proceeding and in this opinion, the commissioners will be referred to as the appellees. The proceeding involves the question of the proper location of the boundaries of ~~two~~ a highway in Sugar township, Marion County, Illinois. ~~In such township, appellant owns three tracts of land, the same~~ defendant being the west half of the south east quarter of the north east quarter, the west half of the north east quarter of the south east quarter and the north west quarter of the south east quarter of section 3. These tracts for con-

Term No. 41. Agenda No.2

March Term, 1915.

Omer E. Perry, Appellant, vs. Commissioners of Highways, etc., Appellees.	Appeal from Marion.

Opinion by Clifton, J.:

Appellant filed this bill in chancery, to restrain appellees from encroaching on his lands, removing his fences and cutting his trees, along certain roads and also to restrain them from further proceeding with a suit at law then pending, wherein appellees sought to prosecute him for obstructing certain highways. Appellee, William J. Spencer, is a rural mail carrier, and appears to have been made a defendant in said bill, on account of his traveling over portions of the highways in question, which were in dispute. He has no real interest in the proceeding and in this opinion, the commissioners will be referred to as the appellees. The proceeding involves the question of the proper location of the boundaries of two highways in Cedar township, Marion County, Illinois. In each township, appellant owns three tracts of land, the same being the west half of the south east quarter of the north east quarter, the west half of the north east quarter of the south east quarter and the north west quarter of the south east quarter of section 3. These tracts for con-

venience ~~will be~~ are referred to as Nos. 1, 2 and 3 respectively, in the order above named. No. 2 lies directly south of No. 1 and east of No. 3. ~~One of~~ the roads in dispute runs north and south along the west side of tract No. 1 and the other runs east and west between tracts Nos. ~~ix~~ 1 and 2 and along the north side of tract No. 3, intersecting the first road where the three tracts of land corner. The court sustained the claims of appellant as to the boundaries of the north and south road and gave him the relief sought and as no cross errors were filed, the only questions involved here are those which arise in the proceeding concerning the east and west road.

H. also appeared ~~that the~~ ~~This~~ road, ~~as it appears from the proofs~~, was first traveled through a wooded country and was not ~~a~~ laid out ~~road~~ but ~~simply~~ a line of travel ~~which did~~ not proceeding in a direct line, east and west and ~~had~~ having no particular boundaries. After the road had been traveled for ~~some~~ 30 or 40 years the highway commissioners in 1897 employed Levi S. Meredith, then county surveyor, to survey and define ~~both~~ the east and west road. ~~and the north and south road above referred to.~~ In running the line of the ~~east and west~~ road he started a quarter of a mile east of the intersection of said roads, and ran west to said intersection, where he set a stake or stone, and then continued west another quarter of a mile to the west side of said tract No. 3 where he set another stake or stone, and using the line so run east and west by him for half a mile ~~xxxxxx~~ as the center of the road, he staked out a line 20 feet on each side of the center line, making

venience will be referred to as Tract 1, 2 and 3 respectively, in the order above named. Tract 1 lies directly south of No. 1 and east of No. 3. The road the road in dispute runs north and south along the west side of tract No. 1 and the other runs east and west between tracts Nos. 1 and 2 and along the north side of tract No. 3, intersecting the first road where the three tracts of land corner. The court sustained the claims of appellant as to the boundaries of the north and south road and gave him the relief sought and as no cross errors were filed, the only questions involved here are those which arise in the proceeding concerning the east and west road.

The east and west road, as it appears from the proofs, was first traveled through a wooded country and was not laid out road but simply a line of travel which did not proceed in a direct line, east and west and had no particular boundaries. After the road had been traveled for some 30 or 40 years the highway commissioners in 1897 employed Levi S. Ikredith, then county surveyor, to survey and define both the east and west road, and the north and south road above referred to. In running the line of the east and west road he started a quarter of a mile east of the intersection of said roads, and ran west to said intersection, where he set a stake or stone, and then continued west another quarter of a mile to the west side of said tract No. 3 where he set another stake or stone, and using the line so run east and west by him for half a mile xxxxxx as the center of the road, he staked out a line 20 feet on each side of the center line, making

a highway 40 feet wide. This 40 foot road included ~~within its boundaries~~, all parts of the so called line of travel, ~~although~~ this line ~~traveled by the public~~ was crooked and wandered from side to side of the highway located by the surveyor, defendant ~~appellant~~ and others interested were present when this road was located ~~by the surveyor~~, and it is not disputed that the road ~~so~~ laid out was accepted by the highway commissioners and acquiesced in by those interested, as a public highway. ~~That survey was shown to have been made in response to a petition therefor but the petition was not introduced in evidence.~~ In March, 1911, the highway commissioners of the township, of their own motion, employed F. W. Warner, then the County surveyor to ~~again~~ re locate the line of this road. Warner ~~in making this survey~~, ignored the line of travel, the fences, the Meredith survey and other evidences of where the road then was, ~~his~~ intending ~~being~~ to ascertain ~~and~~ the east and west line between the north east quarter and the south east quarter of said section 3 in the locality which is in controversy here, and to establish the boundaries of the road twenty feet on each side of such line. In making his survey, he started on the east at the same point as Meredith, ~~did~~, but when he reached the intersection of the east and west road with the north and south road, he placed the stone to mark the corner of the four forty acre tracts which corner there, 12 feet 10 inches south and 7 feet 2 inches east of the stone or stake set by Meredith at said intersection, and at the west end of the road a quarter of a mile further he set a

a highway 40 feet wide. This 40 feet road included ~~within its boundaries~~, all parts of the so called line of travel, ~~although~~ this line ~~traveled by the public~~ was crooked and wandered from side to side of the highway located by the surveyor, ~~[illegible]~~ and others interested were present when this road was located ~~by the surveyor~~, and it is not ~~[illegible]~~ that the road ~~so~~ laid out was accepted by the highway commissioners and acquiesced in by those interested, as a public highway. ~~That survey was claimed as it had been made in response to a petition therefor but the petition was not introduced in evidence.~~ In March, 1911, the highway commissioners of the township, of their own motion, employed J. W. Warner, then the county surveyor to ~~again~~ locate the line of this road. Warner ~~in making this survey~~, ignored the line of travel, the fences, the Meredith survey and other evidences of where the road then was. ~~His intention was~~ to ascertain ~~and~~ east and west line between the north east quarter and the south east quarter of said section 3 in the locality which is in controversy here, and to establish the boundaries of the road twenty feet on each side of such line. In making his survey, he started on the east at the same point as Meredith ~~did~~, but when he reached the intersection of the east and west road with the north and south road, he placed the stone to mark the corner of the four forty acre tracts which corner there, 12 feet 10 inches south and 7 feet 2 inches east of the stone or stake set by Meredith at said intersection, and at the west end of the road a quarter of a mile further he set a

stone to mark the quarter section corner 24 1/3 feet south and 14 2/3 feet west of the stone or stake placed by Meredith. The greater part of the 40 foot road thus established lay south of the line of travel and at two different places said line of travel extended north of the north boundary of the road so laid out. ~~It thus appears that while both surveys~~ started from the same point, yet when they reached the quarter section corner one half mile west of the starting point, the Warner survey located the center of the road 24 1/3 feet south of the point where it was ~~located by Meredith. It is claimed by appellees~~, and there was proof tending to establish ~~such~~ the claim of defendants, that Meredith was directed to survey the road on the half section line and mark it 20 feet on either side thereof, for the highway and that he attempted to do so, but made an error in running the line. There was also proof tending to show that the ~~witnesses~~ who ~~testified that they~~ acquiesced in this survey of the road at the time it was made by Meredith, did so because they thought ~~he was correctly locating the~~ half section line correctly located and would not have done so if they had known that the line was not correctly run on the half section line, ~~that the survey was made by Meredith to ascertain the half section line not to ascertain the line of the road~~. Later in the same year that Warner made his survey, he went over it again with Toothacre, another surveyor, to verify it, and the two found the survey substantially correct, making only some minor changes of no material importance. ~~Appellees~~ Defendants rely on the Warner survey and are seeking to

stone to mark the quarter section corner 24 1/2 feet south and 14 2/5 feet west of the stone or stake placed by Meredith. The greater part of the 40 foot road thus established lay south of the line of travel and at two different places said line of travel extended north of the north boundary of the road as laid out. In some cases that with [illegible] started from the wrong point, yet when they reached the quarter section corner one half mile west of the starting point, the latter surveyor located the center of the road 24 1/2 feet south of the point where it was located by Meredith. It is claimed by appellees, and there was trial tending to establish such claim, that Meredith was directed to survey the road on the half section line and mark it 20 feet on either side thereof, for the highway and that he attempted to do so, but made an error in running the line. There was also proof tending to show that the [illegible] was satisfied that they acquiesced in this survey of the road at the time it was made by Meredith, did so because they thought he was correctly locating the half section line and would not have done so if they had known that the line was not correctly run on the half section line. When the survey was made by Meredith to ascertain the [illegible] section line and to mark the line of the road. Later in the same year that Warner made his survey, he went over it again with Goodnace, another surveyor, to verify it, and the two found the survey substantially correct, making only some minor changes of no material importance. Appellees rely on the Warner survey and are seeking to

establish the boundaries of the highway as located thereby, while appellant claims the road as located by the former commissioners, according to the Meredith survey.

The court in the decree appealed from ~~in this case~~, found that ~~said~~ the surveyor Meredith, located ~~said east and west~~ the road in 1897 in the presence of the then highway commissioners, and the land owners, setting stakes on the north and south side of ~~said~~ the road, marking its boundaries, and that ~~said east and west~~ the road as surveyed and defined by Meredith, became and was the highway and road near to and adjacent to to ~~appellant's~~ plaintiff's land; that ~~said east and west~~ this road as surveyed by Meredith is north of the line of fence which ~~appellees~~ defendants tore down and removed prior to the bringing of this suit; that prior to the removal of the ~~said~~ fence on ~~appellants~~ complainant's land south of ~~said east and west~~ the road, about the time ~~appellees~~ defendants were beginning to work on ~~said~~ the road, ~~appellant~~ complainant pointed out to them and two other persons, the south line of ~~said~~ this road as being along the line of what was afterwards known as the Warner survey, which ~~is~~ was the line claimed by said commissioners as the south line of the road inthis suit; that appellant, James B. Posey ~~is now~~ was estopped fromclaiming that the line of ~~said~~ the Warner survey is not the south boundary of the ~~east and west~~ road and that he ~~is~~ was not entitled to any relief as to ~~said east and west~~ the road; and it was decreed ~~by the court~~ that the line of the east and west road ~~is~~ was the line of the Warner survey and that the limits of ~~said~~ the road

establish the boundaries of the highway as located
survey, which [illegible] the land of [illegible]
by the former commissioners, according to the "credith
survey."

The court in the decree appealed from in this
case, found that said surveyor Credith, located said
[illegible] road in 1807 in the presence of the
then highway commissioners, and the last where a
setting stakes on the north and south side of said
road, marking the boundaries, and that said [illegible]
road be surveyed and defined by [illegible], because
and was the highway and road ever to [illegible] work to
[illegible] land; that said [illegible] road as
surveyed by [illegible] is north of the line of [illegible]
built [illegible] down and removed prior to the
[illegible] of this suit; that prior to the removal of
said [illegible] in [illegible] that [illegible]
[illegible] road, [illegible] the [illegible]
to work on said road, [illegible] [illegible] and
and the [illegible] [illegible], the south line of said road as
being along the line [illegible] [illegible] [illegible] as
the [illegible] survey, which is [illegible] the said [illegible]
commissioners as the south line of the road in
suit; that [illegible], James R. Posey in [illegible] [illegible]
[illegible] that the line of said former survey is
not the south boundary of the [illegible] road and
that [illegible] entitled to [illegible] of said [illegible]
[illegible] road; that it was [illegible] that
the line of the [illegible] road [illegible] of
the [illegible] survey and that the limits of said road

~~are~~ were the limits as designated by ~~said~~ the survey and that ~~said~~ the road is 40 feet in width. It appears ~~evi-dent~~ from all the proofs in the case ~~as a whole~~, that it was the intention of Meredith, at the time he made his survey, as it was of Warner later, to ascertain the the half section line and establish the boundaries of the road twenty feet north and south from such line as a center; that it was the intention of the commissioners at the time Meredith ran this line, to lay out the road with boundaries extending twenty feet on each side of the half section line and that the Meredith survey of the road was for the time acquiesced in, because it was supposed that he had correctly located such half section line. It appears that some question arose as to the proper location of the road prior to the time the Warner survey was made and at that time ~~appellant~~ plaintiff went over the road with the commissioners, both at the east end and the west end thereof; that at that time and also prior thereto, ~~appellant~~ plaintiff cultivated his crops out into the highway and he then pointed out where he thought the line was and told the commissioners that they could grade the road to that line even if it took his crops; that the line so designated was the one which the Warner survey afterwards designated for the true line. The evidence on this point was somewhat confusing, as it referred todifferent objects along the line of road that are not clearly located, but the chancellor hearing the proofs in detail, fixed the places where appellant agreed that appellees should build the road,

as being within the Warner survey and we find no sufficient reason in the record to depart from the conclusion reached by him on that question. Appellant having agreed that the road should be so located and appellees having acted upon the consent so given them, the former cannot now be heard to complain. He was therefore properly refused the relief asked for by him as to the said east and west road. We are more readily lead to this conclusion from the facts that the proof appears to show that Meredith made an error in the location of the line sought to be established by him and that the line run by Warner is the true line, and that it has evidently been the intention at all times, that this road should be established with the half section line as its center.

Holding the views we have above expressed in regard to the facts in the case, we think it would be improper to restrain appellees suit at law against appellant under this bill. Appellees in that suit are suing for a penalty where the parties are entitled to a trial by jury and the matters concerned therein should not and could not be satisfactorily be adjusted in a suit in equity. The decree of the court below will be affirmed.

Affirmed.

Justice McBride, who heard this case in the court below took no part in the trial here.

Not to be reported in full.

be being within the county where and we find no sufficient reason in the record to depart from the conclusion reached by one in that position. Considering having proved that the road should be so located and specifies being acted upon the consent so given then, the farmer cannot now be heard to complain. He was therefore correctly refused the relief asked for by him as to the said east and west road. We are more readily lead to this conclusion from the facts that the proof appears to show that Meredith made an error in the location of the line sought to be established by him and that the line run by Warner is the true line, and that it has evidently been the intention at all times, that this road should be established with the half section line as its center.

Holding the views we have above expressed in regard to the facts in the case, we think it would be improper to restrain appellees suit of the against appellant under this bill. Appellees in that suit are suing for a penalty where the parties are entitled to a trial by jury and the matters complained therein should not and could not be satisfactorily be adjusted in a suit in equity. The decree of the court below will be affirmed.

Affirmed.

Justice McKride, who heard this case in the court below took no part in the trial here.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of December, A. D. 1915.*

C. C. Johnson,

Clerk of the Appellate Court.

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the 1st *day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Ellen C. Griffin
Plff. in Error

vs.

No. 1 W

March Term, 1915

William W. Halbert Admr.
Plff. in Error

1961.A.601

ERROR TO
~~APPEAL FROM~~

Circuit COURT

St Clair COUNTY

TRIAL JUDGE

HON. George A. Crow

Term No. 13 Agenda No.46.

March Term, 1915.

Ellen C. Griffin, Defendant in Error,	)	
Vs.	)	Error to St.Clair.
William U. Halbert, Administrator, etc. Plaintiff in Error.	)	

Opinion by Higbee, P.J.

This is an appeal from a judgment of the Circuit Court of St. Clair County, approving the allowance of a claim by the probate Court, in favor of Ellen C. Griffin against the estate of Sarah Ann Johnson, for the principal and interest of a promissory note for $2800, executed by said Sarah Ann Johnson and her husband Benjamin Johnson, both now deceased. The allowance of the claim was contested by the administrator of said estate, who brings the case to this court and the controversy is shown by the proofs to have grown out of the following facts:

* ~~On November 6, 1908~~, Henry J. Fink, ~~was doing business as~~ a loan broker in Belleville, Illinois, ~~and in pursuit of his business would~~ and as such loaned money on real estate and afterwards ~~sell~~ sold the securities to ~~persons having money to invest.~~ investors. ~~It was also~~ as a part of his business ~~to see~~ to see that the property securing the loan was insured and received interest

Term No. 18 Appeals No.44.

March Term, 1918.

William C. Griffin, Defendant in Error,	
Vs.	Error to St.Clair.
William U. Halbert, Administrator, etc. Plaintiff in Error.	

Opinion by Higbee, J.J.

This is an appeal from a judgment of the Circuit Court of St. Clair County, approving the allowance of a claim by the probate Court, in favor of William C. Griffin against the estate of Sarah Ann Johnson, for the principal and interest of a promissory note for $2800, executed by said Sarah Ann Johnson and her husband Benjamin Johnson, both now deceased. The allowance of the claim was contested by the administrator of said estate, who brings the case to this court and the controversy is shown by the proofs to have grown out of the following facts:

[illegible] Mr Rosenberg C. Tabb, Henry C. Kline, was doing business as a loan broker in Belleville, Illinois, and in pursuit of his business would loan money on real estate and otherwise assist in securities to persons having money to invest. It was also part of his business to see that the property securing the loan was insured and received interest

from borrowers, and ~~sal~~ paid it to ~~persons~~ the holders of the notes. ~~the loans on which such interest had been paid.~~ On ~~that day~~ December 6, 1908, he loaned to Sarah Ann Johnson and her husband, Benjamin Johnson $2800 and took their joint note ~~for that amount~~, due in three years, with interest at the rate of six per cent ~~per annum~~ payable semi-annually and evidenced by six interest notes, for $84 each. ~~The notes were~~ secured by a mortgage on a lot upon which was ~~situated~~ a dwelling house. ~~and~~ The loan was procured for the Johnsons by ~~E. E. Brewer,~~ a contractor who built the house for them. The notes and mortgage were ~~made~~ payable to Henry J. Fink, trustee. Shortly after ~~their~~ the execution of the notes and mortgage Fink sold and delivered them ~~the securities~~ to Ellen C. Griffin, ~~transferring the principal note by proper indorsement, but making no indorsement on the interest notes or mortgage.~~ Thereafter Fink notified Mrs. Johnson a few days before each interest note became due and she paid the interest to him, he in turn paying the same to Mrs. Griffin who delivered the interest note so paid to him, which he sent to Mrs. Johnson. This manner of collection and payment seemed to have continued during the three years, ~~the loan was made for~~. On November 11, 1911, after the principal note had become due, Mrs. Johnson paid Fink $1800 on the principal ~~of said note~~ and took his written receipt therefor, the ~~written~~ receipt showing that ~~said~~ the payment was to be applied on ~~such~~ the loan. There is no evidence that Fink had been authorized by Mrs. Griffin to receive

from [illegible], and [illegible] to [illegible] [illegible]
[illegible]. In
[illegible] [illegible] [illegible] [illegible] [illegible]
that day he loaned to Mrs. Ann Johnson and her
husband, Benjamin Johnson $2800 and took their joint
note for that amount, due in three years, with
interest at the rate of six per cent per annum pay-
able semi-annually and evidenced by six interest
notes, for $84 each. The notes were secured by a
mortgage on a lot upon which was situated a dwelling
house, and the loan was procured for the Johnsons
by ..... Dawson, a contractor who built the house
for them. The notes and mortgage were made pay-
able to Henry T. Ian, trustee. Shortly after their
execution, Ian died and delivered the securities to
Allen C. Griffin, transferring the principal note
by proper indorsement, but making no indorsement on
the interest notes or mortgage. Thereafter Ian
notified Mrs. Johnson a few days before each inter-
est note became due and she paid the interest to him,
he in turn paying the same to Mr. Griffin who del-
ivered the interest note so paid to him, which he
sent to Mrs. Johnson. This manner of collection
and payment seems to have continued during the
three years, the loan was made for. On November
11, 1911, after the principal note had become due,
Mrs. Johnson paid $1800 on the principal
of said note and took his receipt therefor, the
written receipt showing that said payment was to
be applied on such loan. There is no evidence that
Ian had been authorized by Mrs. Griffin to receive

said amount on the principal or that Mrs. Johnson knew that the notes had been sold and transferred to her. ~~At this time Mrs. Johnson wanted to extend the balance of the loan, for a longer period~~, but as ~~her husband had died in the meantime, Fink told her the extension could not be made until her husband's estate was settled up, but that then it could be arranged, for. Thereafter Fink received interest from Mrs. Johnson for the unpaid $1000 but paid Mrs. Griffin interest on the full amount~~. A month or so after the receipt of this money ~~from Mrs. Johnson~~, he informed Mrs. Griffin of the fact and offered her other loans for the amount ~~he had so~~ received, but she refused, ~~to take them~~. She came to Fink's office a number of times about the matter ~~and while refusing new loans~~ said she wanted the money but ~~she~~ did not get it. On August 29, 1912 Mrs. Griffin wrote to Fink ~~from her home at Freeburg, Illinois~~, saying she had seen a notice of Mrs. Johnson's death, ~~in the paper, and complaining that he had not looked after her interest in the settlement of Benjamin Johnson's estate and~~ further wrote, "You told me they would pay a $1000 or more on the mortgage. There is nothing paid and Mrs. Johnson is dead. I want to hear immediately why ~~then~~ that estate was not settled and that payment made as you said it would be. If you had looked after it thatpayment would have been made. That would have cut the mortgage down. That is a heavy mortgage for that house. You hold that $1000 for me. Don't let them have it." Other

said amount on the principal of that Mrs. Johnson knew that the notes had been sold and transferred to Ray. ~~At this time the defendant manager to retain the balance of the item, as a larger number, but as her husband had died in the interim, only held for the extension could not be made until his husband's estate was settled up, but that then it could be arranged, Mr. Thereupon Link retained interest from Mrs. Johnson for the unpaid $1000 one year. Griffin interest on the 8th ~~month~~. A month or so after the receipt of this money ~~[illegible]~~. Johnson, he informed Mrs. Griffin of the fact and offered her other loans for the amount he had so received, but she refused, ~~to take them~~. He came to Link's office a number of times about the matter ~~and while talking [illegible]~~ said he wanted the money but ~~was~~ did not get it. On August 29, 1912 Mrs. Griffin wrote to Link ~~[illegible]~~ Freeburg, Illinois, saying she had seen a notice of Mrs. Johnson's death in the paper, and complaining that he had not looked after her interest in the settlement of Benjamin Johnson's estate and further wrote, "You told me they would pay a $1000 or more on the mortgage. There is nothing paid and Mrs. Johnson is dead. I want to hear immediately why ~~mean~~ that estate was not settled and that payment made as you said it would be. If you had looked after it that payment would have been made. That would have cut the mortgage down. That is a heavy mortgage for that house. You hold that $1000 for me. Don't let them have it." Other

correspondence passed betweenthem in which she demanded a $1000 which she appears to have thought was the amount paid to Fink and stating that if it was not paid, she was going to close the mortgage, but he failed to pay her any of the money and finally failed financially and fled the country. Mrs. Griffin then presented her claim against the estate of Mrs. Johnson and the same was allowed by the probate court. Upon appeal to the circuit court the same result followed and the claim of Mrs. Griffin was allowed for $2983.85.

The case is brought here by the administrator of the estate of Mrs. Johnson and her counsel insists that Mrs. Griffin, having permitted Fink to act as her agent in collecting interest and Mrs. Johnson having no knowledge that the loanwas transferred, the payment to Fink of the ~~xxxx~~ $1800 was in effect a payment to Mrs. Griffin and she was bound thereby; alsothat as after Fink notified her he had received a payment on the note she requested him to hold the $1000 for her and not "let them have it". That this was a ratification of the receipt of the money by him and to that extent she is bound. It appears from the proofs, however, that Fink in the collection of interest would get the money therefor from Mrs. Johnson before the interest notes were delivered to him by Mrs. Griffin, and that when the $1800 was paid to him he did not have the principal note in his hands and there is no proof that Mrs. Griffin had clothed him with authority to receive this sum for her. The fact that Fink had

correspondence passed between them in which she demanded a $1000 which she appears to have thought was the amount paid to Link and stating that if it was not paid, she was going to close the mortgage, but he failed to pay her any of the money and finally failed financially and lost his property. Griffin then presented her claim against the estate of Mrs. Johnson and the same was allowed by the probate court. Upon appeal to the circuit court the same result followed and the claim of Mrs. Griffin was allowed for $2983.85.

The case is brought here by the administrator of the estate of Mrs. Johnson and he answers that Mrs. Griffin, having permitted Link to act as her agent in collecting interest and Mrs. Johnson having no knowledge that the loan was transferred, the payment to Link of the ~~xxxx~~ $1800 was in effect a payment to Mrs. Griffin and she was bound thereby; alleging as after claim notified her he had received a payment on the note she requested him to hold the $1000 for her and not "let them have it". That this was a ratification of the receipt of the money by him and to that extent she is bound. It appears from the proofs, however, that Link in the collection of interest would get the money therefor from Mrs. Johnson before the interest notes were delivered to him by Mrs. Griffin, and that when the $1800 was paid to him he did not have the principal note in his hands and there is no proof that Mrs. Griffin had clothed him with authority to receive this sum for her. The fact that Link had

sold other loans to Mrs. Griffin and that she had loaned him money, did not make him her agent to receive the $1800. To bind her he must have had authority either express or implied to receive the same or had possession of the note but we find no facts which would raise such implication, and as before said he did not have possession of the note. It was the duty of the payor to ascertain if Fink had authority to receive the money and in the absence of otherproof she should, for her own protection, have demanded the production of the note and have seen that credit for the amount paid be placed upon the same. In receiving this payment of $1800, it would appear from the proofs that Fink was acting as the agent for Mrs. Johnson and not as the agent of Mrs. Griffin. Where a person purchases notes from a broker and such notes are not left with him, but are taken by the purchaser, the broker is not, in the absence of authority, the agent of the purchaser to receive payment of the notes. Viskocil Vs. Doktor 27 Ill., App. 232. Stockton Vs. Fortune 82 Ill., App. 272. The collection of other securities or even a part of the existing debt, is not sufficient to raise an implied authority in the agent to receive payment and express authority to collect interest, is not sufficient to authorize the collection of the principal. Garrels Vs. Morten, 26 Ill., App. 433. But even if Fink cannot be considered as the agent of Mrs. Griffin, under the proofs, with authority tocollect the $1800 received by him, yet strong reliance is placed by counsel for

said other loans to Mrs. Griffin and that she had loaned him money, did not make him her agent to receive the $1800. To bind her he must have had authority either express or implied to receive the same or had possession of the note but we find no facts which would raise such implication, and as before said he did not have possession of the note. It was the duty of the payor to ascertain if Fink had authority to receive the money and in the absence of otherproof she should, for her own protection, have demanded the production of the note and have seen that credit for the amount said be placed upon the same. In receiving this payment of $1800, it would appear from the proofs that Fink was acting as the agent for Mrs. Johnson and not as the agent of Mrs. Griffin. Where a person purchases notes from a broker and such notes are not left with him, but are taken by the purchaser, the broker is not, in the absence of authority, the agent of the purchaser to receive payment of the notes. Vilskoil Vs. Doktor 27 Ill., App. 282. Stockton Vs. Fortune 52 Ill., App. 272. The collection of other securities or even a part of the existing debt, is not sufficient to raise an implied authority in the agent to receive payment and express authority to collect interest, is not sufficient to authorize the collection of the principal. Garrels Vs. Morton, 26 Ill., App. 433. But even if Fink cannot be considered as the agent of Mrs. Griffin, under the proofs, with authority toconfect the $1800 received by him, yet strong reliance is placed by counsel for

plaintiff in error upon the claim that after he had received the money, his action was ratified by Mrs. Griffin, but the weakness of this claim is that the proof does not appear to show that she ever ratified such act. After the payment was made Fink wanted her to take other securities for it, but she refused to do so and demanded the money. She did not treat the payment to him as a payment to her. In her letter to Fink above referred to, she appears to have the idea that the amount paid Fink was $1000 and she demanded this of him and threatened to foreclose the mortgage if it was not paid. The statement to Fink in the letter, "You told me they would pay $1000 or more on the mortgage. There is nothing paid and Mrs. Johnson is dead. You hold that $1000 for me, don't let them have it", does not indicate that she considered the money was already paid to him as her agent to be credited on her note, but indicated simply a desire to get the money to be credited upon the note as she did not consider the security ample for the debt. That neither she nor Fink treated this payment as having been made to her upon the note, is also shown by the fact that Fink paid her the interest on the full amount of $2800, until May, 1913. The evidence as a whole, fails to show a ratification by Mrs. Griffin of the receipt by Fink of the $1800 ~~firmx~~ from Mrs. Johnson. It is of course unfortunate that the estate of Mrs. Johnson should have to pay again the $1800 which she paid to Fink tobe applied

plaintiff in error upon the claim that after he had received the money, his action was ratified by Mrs. Griffin, but the weakness of this claim is that the proof does not appear to show that she ever ratified such act. After the payment was made Link wanted her to take other securities for it, but she refused to do so and demanded the money. She did not treat the payment to him as a payment to her. In her letter to Link above referred to, she appears to have the idea that the amount paid Link was $1000 and she demanded this of him and threatened to foreclose the mortgage if it was not paid. The statement to Link in the letter, "You told me they would pay $1000 or more on the mortgage. There is nothing paid and Mrs.Johnson is dead. You hold that $1000 for me, don't let them have it", does not indicate that she considered the money was already paid to him as her agent to be credited on her note, but indicated simply a desire to get the money to be credited upon the note as she did not consider the security ample for the debt. That neither she nor Link treated this payment as having been made to her upon the note, is also shown by the fact that Link paid her the interest on the full amount of $2800, until May,1913. The evidence as a whole, fails to show a ratification by Mrs. Griffin of the receipt by Link of the $1800 ~~[illegible]~~ from Mrs. Johnson. It is of course unfortunate that the estate of Mrs. Johnson should have to pay again the $1800 which she paid to Link upon applied

on the note in question. She could, however, have easily avoided all trouble about the matter had she required Fink to produce the note at the time of the payment and credit the payment upon it. The unfortunate condition of affairs existing, was brought about bythe misconduct of Fink and not by any misconduct orneglect on the part of Mrs. Griffin who was the holder of the note and never received any payment upon the principal thereof. The court below properly allowed the claim of defendant in error against the estate of Mrs. Johnson and the judgment order, making said allowance, will be affirmed.

Judgment affirmed.

Not to be reported in full.

on the note in question. She could, however, have easily avoided all trouble about the matter had she required Link to produce the note at the time of the payment and credit the payment upon it. The unfortunate condition of affairs existing, was brought about by the miscomment of Link and not by any misconduct or neglect on the part of Ira. Certainly non was the holder of the note and never received any payment upon the principal thereof. The court below properly allowed the claim of defendant in effect against the estate of Ira. Therefore the judgment order, making said allowance, will be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15 *day of December, A. D. 1915.*

Clerk of the Appellate Court.

OPINION

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s .....

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the 1st *day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

William Elliott
Appellee

vs.

No. 14
March Term, 1915

Herman Maver

196 I.A. 605

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Edwards COUNTY

TRIAL JUDGE

HON. Wm. H. Green

Term No. 14. Agenda No.4.

March Term, 1915.

William M. Elliott, Appellee.	)	
Vs.	:	Appeal from Edwards.
Herman Naves. Appellant.	)	

Opinion by Higbee, P. J.

Appellee, William M. Elliott, sued appellant, Herman Naves, before a justice of the peace, to recover broker's commissions for trading appellant's store building and stock of goods, to one Charles Naylor, for sixty-five acres of land. The jury before whom the case was tried, returned a verdict in favor of appellee for $150.00, and upon appeal to the Circuit Court, there was again a verdict and judgment in favor of appellee, this time for $125.00. Appellant seeks to reverse the judgment of the circuit court, for the reasons, as claimed by him, that the verdict of the jury was not sustained by the evidence and the court erred in instructing the jury.

The proofs showed that ~~appellant~~ defendant had a ~~building and stock of goods~~ store at Browns, Illinois, and that ~~appellee~~ plaintiff was ~~engaged~~ in the real estate business at Albion, Illinois. ~~About the middle of January, 1913, appellant employed appellee to sell or trade his property for which he agreed, according~~

Term No. 14. Appeal No.4.

April Term, 1913.

William K. Hilliott, Appellee.	
Vs.	Appeal from Owards.
Herman Naves. Appellant.	

Opinion by Higbee, P. J.

Appellee, William K. Hilliott, sued appellant, Herman Naves, before a justice of the peace, to recover broker's commissions for trading appellant's store building and stock of goods, to one Charles Naylor, for sixty-five acres of land. The jury before whom the case was tried, returned a verdict in favor of appellee for $150.00, and upon appeal to the Circuit Court, there was again a verdict and judgment in favor of appellee, this time for $125.00. Appellant seeks to reverse the judgment of the circuit court, for the reasons, as claimed by him, that the verdict of the jury was not sustained by the evidence and the court erred in instructing the jury.

The proofs showed that appellant had a building and stock of goods at Owens, Illinois, and that appellee was engaged in the real estate business at Albion, Illinois. About the middle of January, 1913, appellant employed appellee to sell or trade his property for which he agreed, according

~~to the testimony of appellee to pay a commission of 2½ per cent. for his services. Afterwards appellee took several persons to see appellant's property but failed to make a trade.~~ Sometime in February following, ~~appellant~~ defendant went to Albion, where he met ~~appellee~~ plaintiff, who ~~stated~~ testified that at that time ~~appellant~~ defendant asked him to try ~~and~~ to effect a trade with Naylor, who had visited the property ~~in company~~ with Elbert Epler. ~~Appellee claims and so~~ plaintiff testified that Epler was induced by him to take Naylor to see the property. ~~Appellant~~ defendant denied that he had ~~said~~ any conversation with ~~appellee~~ plaintiff at Albion, but it appeared ~~from the evidence~~ that immediately after it is claimed ~~by appellee to~~ plaintiff to have taken place, ~~appellee~~ plaintiff went with Naylor to an attorney's office and then went out and met ~~appellant~~ defendant and Epler and returned with them to the office; that the terms of the trade were then agreed upon and the attorney instructed to draw up an agreement, which was done, and that while the contract was being drawn, an alteration was made in it for ~~appellant's~~ defendant's benefit at the suggestion of ~~appellee~~ plaintiff and the contract was then signed. ~~and the trade consummated.~~ In regard to the contract between ~~appellant~~ defendant and ~~appellee~~ plaintiff concerning the agency for the sale of the land, there was some ~~controversy~~ conflict in the testimony. ~~Appellee~~ plaintiff testified that he contracted with ~~appellant~~ defendant to act as his agent in selling the property and was to receive for his services a commission of two and a half per cent of the selling or trading price. ~~Appellant~~ defendant testified that his statement to ~~appellee~~ plaintiff was "the party that brings me a deal gets a commission but I reserve the right to make the deal myself provided I can."

and ~~he~~ claimed to have made the deal himself ~~and therefore not to be indebted to appellee for commissions~~. A witness, Lovellette, who was present at the time of the making of the oral contract between ~~appellant~~ defendant and ~~appellee~~ plaintiff, corroborated the ~~plaintiff's testimony~~ plaintiff's testimony. Upon the whole the proof appears to sustain the theory that the contrary of agency was made as claimed by appellee andthat he was instrumental in bringing about the exchange of property between appellant and Naylor. Under these circumstances appellee was entitled to recover his commissions and the jury properly found the facts in his favor.

Complaint is made by appellant of the modification by the court of certain instructions asked by him, which as originally presented, told the jury that if they found the facts as stated therein they "should" find for the defendant. The court modified these instructions by changing the word "should" to "may". These instructions as presented, were correct and ought to have been given by the court without modification. As they were given they do not make it mandatory upon the jury to find in favor of the defendant. In some connections the words "should" and "may" are held to mean substantially the same thing. C. & E. R. R. Co., Vs. Neech, 163 Ill., 305. But we do not think they could properly be so construed as used in the instructions referred toin the present case. If the case were a close one upon the facts, the modification complained of might constitute such a material error as to

and he claims to have made the deal himself and therefore not to be indebted to appellee for commissions. A witness, Lovelette, who was present at the time of the making of the real contract between appellant and appellee, corroborated the statement of appellee. On the main issue the proof appears to sustain the theory that the contrary of agency was made as claimed by appellee and that he was instrumental in bringing about the exchange of property between appellant and Taylor. Under these circumstances appellee was entitled to recover his commissions and the jury properly found the facts in his favor.

Complaint is made by appellant of the modification by the court of certain instructions asked by him, which as originally presented, told the jury that if they found the facts as stated therein they "should" find for the defendant. The court modified these instructions by changing the word "should" to "may". These instructions as presented, were correct and ought to have been given by the court without modification. As they were given they do not make it mandatory upon the jury to find in favor of the defendant. In some connections the words "should" and "may" are held to mean substantially the same thing. C. B. & Q. R. R. Co., v. Ward, 163 Ill., 305. But we do not think they could properly be so construed as used in the instructions referred to in the present case. If the case were close one upon the facts, the modification complained of might constitute such a material error as to

warrant a reversal of the judgment, but under the facts as they exist here, we donot believe the jury were misled by these instructions or that the interests of justice would be furthered by reversing the judgment on this account.

Appellant's refused instructions seven and nine, appear to be covered so far as they state correct principles of law by other instructions given for him. Instruction No. 8 given for appellee is a subject of criticism, because in purporting to state the conditions under which appellee would be entitled to a verdict, it omits the question whether there was a contract for commissions between appellant and appellee. Other instructions however declare the necessity of such a contract to entitle appellee to recover, and the case was tried upon that theory so that the failure to reiterate the necessity of such a contract in the instruction in question, was not a material error.

The judgment of the court below will be affirmed.

Affirmed.

Not to be reported in full.

warrant a reversal of the judgment, but under the
facts as they exist here, we donot believe the jury
were misled by these instructions or that the in-
terests of justice will be furthered by reversing
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Appellant's refused instructions seven
and nine, appear to be correct as far as they state
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a subject of criticism, because in purporting to
state the conditions under which appellee would be
entitled to a verdict, it omits the question whether
there was a contract for commissions between
appellant and appellee. Other instructions however
declare the necessity of such a contract to entitle
appellee to recover, and the case was tried upon
that theory so that the failure to reiterate the
necessity of such a contract in the instruction in
question, was not a material error.

The judgment of the court below will be
affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of December, A. D. 1915.*

C. C. Johnson

Clerk of the Appellate Court.

OPINION

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1211

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the 1st *day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

The People etc.
Deft. in Error

vs.

No. 20
March Term, 1915

Julius Keyser
Plff. in Error

ERROR TO
~~APPEAL FROM~~

County COURT

Wayne COUNTY

TRIAL JUDGE

HON. J. U. Meidinger

Term No. 20. Agenda No. 10.

March Term, 1915.

The People of the State of Illinois, Defendant in Error,	
Vs.	Error to County Court
Julius Keyser, Plaintiff in Error.	of W--A--Y--N--E.

Opinion by Higbee, P. J.

Julius Keyser, the plaintiff in error, on complaint of his wife Leonne Keyser, was arrested and tried in the county court of Wayne County upon the charge of wife abandonment. The jury returned a verdict of guilty against plaintiff in error and the court gave judgment against him for costs and ordered that he forfeit and pay to his wife the sum of $416.- in weekly payments of $8 a week for the period of fifty two weeks. It was further ordered that he should appear in court whenever directed to do so within one year and that upon entering into recognizance to be approved by the court for his faithful compliance with the terms of the order, he should be released from custody on probation.

Plaintiff in error seeks to reverse the judgment, alleging as reasons therefor that the evidence was insufficient to warrant

Term No. 79. Opinion filed.

Mt. Vernon Term, 1911.

The People of the State of Illinois, Defendant in Error, vs. Julius Keyser, Plaintiff in Error.	Error to County Court of *--a--r--k--.

Opinion by Vickers, J. J.

Julius Keyser, the plaintiff in error, on complaint of his wife Leonne Keyser, was arrested and tried in the county court of Wayne County upon the charge of wife abandonment. The jury returned a verdict of guilty against plaintiff in error and the court gave judgment against him for costs and ordered that he forfeit and pay to his wife the sum of $416.- in weekly payments of $8 a week for the period of fifty two weeks. It was further ordered that he should appear in court whenever directed to do so within one year and that upon entering into recognizance to be approved by the court for his faithful compliance with the terms of the order, he should be released from custody on probation.

Plaintiff in error seeks to reverse the judgment, alleging as reasons therefor that the evidence was insufficient to warrant

the verdict of the jury and the amount he was ordered to pay was excessive.

* ~~The facts~~ It appeared ~~from the record to be as follows: On September 20, 1911~~ that Julius Keyser and Leonne Shelton were married, on September 30, 1911 ~~then being 19 years of age and she 17.~~ ~~The parents of the young people were farmers living a few miles apart.~~ Winfield Keyser, the father of Julius owned ~~120 acres of land,~~ a farm, with a ~~seven room~~ house thereon, in which he lived with his wife and Julius, ~~who was his only child.~~ The father and son ~~were~~ operated the farm as partners and after the marriage, the son brought the wife to the father's home and she became one of the family, helping the mother ~~care for~~ in the house work. ~~and prepare the meals. This arrangement continued until October 10, 1913.~~ In the meantime a son had been born ~~to them~~, and the wife was soon ~~again~~ to become a mother, a fact. Prior to this time, the regard of ~~plaintiff in error~~ defendant for his wife seems to have waned and at times he refused to speak to her. About October 10, 1913 ~~the date last mentioned, which was a little more than~~ a month before her second child was born, he sold ~~out~~ his ~~partnership~~ interest to his father for $800. and taking that money with him and without ~~making definite~~ arrangements for ~~ments as to~~ the care of his wife and child, went to the northern part of the state, ~~to shuck corn.~~ When his wife asked him where he

the verdict of the jury and the amount he was ordered to pay was excessive.

The facts appeared from the records to be as follows: On September 20, 1871 Julius Keyser and Leanna Shelton were married, Mr. then being 19 years of age and she 17. The parents of the young people were living a few miles apart. Mahlaid Keyser, the father of Julius owned 180 acres of land, with a seven room house thereon, in which he lived with his wife and Julius, who was his only child. The father and son were operating the farm as partners and after the marriage, the son brought the wife to the father's home and she became one of the family, helping the women-folks the house and assuming the work. Matrimony went continued until October 10, 1898. In the meantime a son had been born to them, and the wife was seen [illegible] to petition a [illegible] prior to this time, the record [illegible] [illegible] for his wife seems to have waned and at times he refused to speak to her. [illegible] [illegible] a month before her second child was born, he sold out his partnership interest to his father for $800, and taking that money with him and without making definite arrangements as to the care of his wife and child, went to the northern part of the state, [illegible] [illegible]. When his wife asked him where he

was going he made no ~~refused to give her a~~ satisfactory answer, and stated he was going to Mexico. The mother of Julius ~~being unable and~~ refused to take care of her daughter in law during her illness, she was taken to her own mother, who ~~was~~ then lived at Fairfield, ~~fourteen miles distant from the farm of Winfield Keyser~~, where she and her two children have ~~continued to~~ resided. ~~Plaintiff in error~~ Defendant remained in the north until Christmas, during which time he neither wrote to his wife, or sent anything for her support. He afterwards went ~~to a sister's at~~ to Mattoon, Illinois ~~and stayed~~ for a short time and then returned to his father's home, where he has since lived. On one occasion ~~during the August~~ following his return, he came ~~to the place~~ where his wife was living but said that he came ~~there~~ to see his son ~~Charles. but~~ Neither at that time nor ~~at any other~~ afterward did he ~~make any~~ offer to take his wife back nor ~~was~~ she offered to return and during this time she ~~has been~~ was supported by her parents. At no time since they have been apart ~~has~~ did he give her anything, prior to the commencement of this suit. Several months after the suit was commenced he gave her $1.50 and also furnished a small amount of second hand clothing for the children.

Under these facts we are of opinion that the jury were fully warranted in finding that plaintiff in error was guilty of the crime of

was going he entered Longview was a motorlessly answer, and stated he was going to Canton. The point of juice water became saturated in the care of her daughter in law during her illness, she was taken to her own mother, who was then living at Interlaken, Tuscaloosa county distant from the city of Tuscaloosa, where she and her son William now maintained a residence. Plaintiff in error remained in the north until Christmas, during which time he neither wrote to his wife, or sent anything for her support. He afterwards went to Sterling in Whiteside, Illinois and stayed for a short time and then returned to Interlaken a town, where he has since lived. On one occasion during the August following his return, he came to the place where his wife was living but said that he came there to see his son Charles. But neither at that time nor at any other did he make any offer to take his wife home nor was she offered to return and share his time she has been supported by her parents. At no time since they have been apart has he given her anything, prior to the commencement of this suit. Several months after the suit was commenced he gave her $1.50 and also furnished a small amount of second hand clothing for the future.

Under these facts we are of opinion that the jury were fully warranted in finding that plaintiff in error was guilty of the crime of

wife abandonment within the meaning of the statute, which provides "that every person who shall without good cause abandon his wife, and neglect and refuse to maintain and provide for her...shall be deemed guilty of a misdemeanor." Rev. Stat. (Hurd) Chap. 68, par. 24. Jta 3431

Plaintiff in error complains that the condition in life of himself and wife did not justify the amount allowed by the court to the wife. It must be remembered, however, that this is not a suit for separate maintenance but is a criminal prosecution for wife abandonment, and the amount ordered to be paid the wife under the statute, is in fact a fine assessed against the husband for a criminal act, and therefore the amount is not to be determined by the same rules that govern the court in a case of separate maintenance. When plaintiff in error left his wife to go north, he made no provision whatever for her support although he had $800. in money at the time. She has received no part either of this or of his earnings since the time he went away except the trivial amount of $1.50. The amount of the penalty under the law must be left somewhat to the discretion of the court and in this case we think that discretion has not been abused.

The judgment of the court below will be affirmed.

Affirmed.

Not to be reported in full.

wife abandonment which, the wording of the statute, which provides "that every person who shall without good cause abandon his wife, and neglect and refuse to maintain and provide for her, shall be deemed guilty of a misdemeanor." Rev. Stat. (Burd) Chap. 66, par. 74. 0 4 0 3 9 3 1

Plaintiff in error contends that the contention in this of Hammel and wife did not justify the amount ordered by the court to the wife. It must be remembered, however, that this is not a suit for separate maintenance but a criminal prosecution for wife abandonment, and the amount ordered to be paid the wife under the statute, is in fact a fine assessed against the husband for a criminal act, and therefore the amount is not to be determined by the same rules that govern the court in a case of separate maintenance. When plaintiff in error left his wife to go north, he made no provision whatever for her support although he had $800. in money at the time. She has received no part either of this or of his earnings since the time he went away except the initial amount of $10.

The amount of the penalty under the law must be left somewhat to the discretion of the court and in this case we think that discretion has not been abused.

The judgment of the court below will be affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of December, A. D. 1915.*

Clerk of the Appellate Court.

OPINION

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1212

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the 1st *day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

196 I.A. 620

Mrs. George Grimm
Appellee

vs.

No. 22
March Term, 1915

G. H. Lienemann et al
Appellants

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. W. E. Hadley

Term No. 22 Agenda No.37.

March Term, 1915.

Mrs George Grimm, Appellee, Vs. C. H. Liénemann, etlal., Appellant.	Appeal from Madison.

Opinion by Higbee, P. J.

Appellee sued appellant on a note for $252.00 dated September 14, 1910, with interest from maturity, at the rate of five per cent per annum. Appellants filed plea of partial payment to the amount of $175. and made tender of the balance. By agreement a jury was waived and the court having heard the case, refused to allow the credit and entered judgment for principal and interest. There were no propositions of law or fact presented and the only question on this appeal is as to the weight of the evidence.

* ~~We learn from the proofs~~ It appears that George Grimm, who owned a saloon in New Douglas, Illinois, died in July 1910, ~~leaving a widow and family;~~ that the value of the stock ~~on hand~~ and fixtures of the saloon ~~at that time~~ then, amounted to between $600 and $800 ~~in value.~~ ~~It appears~~ There was little other property, and ~~after~~ the stock and fixtures ~~had been appraised at $314.64 they~~ were taken by the widow

Term No. 22 Agenda No.37.

[illegible] Term, 1918.

Mrs George Grimm, Appellee, Vs. G. A. [illegible], etal., Appellant.	Appeal from Madison.

Opinion by Higbee, J. J.

Appellee sued appellant on a note for $[illegible].00 dated September 14, 1910, with interest from maturity, at the rate of five per cent per annum. Appellants filed plea of partial payment to the amount of $175. and made tender of the balance. By agreement a jury was waived and the court having heard the case, reduced to allow the credit and entered judgment for principal and interest. There were no propositions of law or fact presented and the only question on this appeal is as to the weight of the evidence.

Grimm, who owned a saloon in New Douglas, Illinois, died in July 1910. ~~leaving a widow and family;~~ that the ~~stock on hand~~ value of the saloon ~~at that time~~ amounted to between $600 and $800, ~~in value. It appears~~ there was little other property, and ~~after~~ the stock and fixtures ~~had been appraised at $[illegible].00~~ they were taken by the widow

on her award, ~~which exceeded that amount~~. On September 6, 1910, George Grimm, Jr., as agent for his mother, sold the ~~saloon~~ stock and fixtures to ~~appellant,~~ defendant G. H. Lienemann for his son-in-law Eph Vinyard. ~~It appeared that~~ At the time of his death George Grimm, Sr. owed the Highland Brewing Company $175.00 ~~and~~ so that it was necessary to get the consent of the company to make a transfer of the property. ~~To secure the same~~, George Grimm, Jr., Lienemann and Vinyard called upon Eugene Schott the president of the Brewing Company. Schott drew up ~~the following~~ an agreement which was signed by Vinyard and Grimm, Jr., the latter acting for his mother:

"September 6th, 1910.

This agreement entered into between Geo. Grimm and Eph Vinyard, both of New Douglas, Illinois. Geo. Grimm agrees to sell his father's saloon business in New Douglas, Illinois, to Eph Vinyard. And Eph Vinyard agrees to buy Geo. Grimm's ~~xxxxxx~~ saloon business. They both agree that the stock of goods shall be invoiced. Geo. Grimm to select one invoicer and Eph Vinyard to select one invoicer; if these two cannot agree they shall select the third; then all three shall appraise the stock. The furniture of the saloon shall be priced by Eph Vinyard and Geo. Grimm and the price shall be what they will agree upon. Mr. Geo. Grimm promises to pay the Highland Brewing Company $125.00 for the note which they hold against his father and Eph Vinyard shall pay the Highland Brewing Co. $50.

on her award, which exceeded that amount. On September 6, 1910, George Grimm, Jr., as agent for his mother, sold the saloon stock and fixtures to [illegible] G. M. Ilsenmann for his son-in-law John Vinyard. It appeared that at the time of his death George Grimm, Sr. owed the Highland Brewing Company $175.00 and that it was necessary to get the consent of the company to make a transfer of the property. To secure the same, George Grimm, Jr., Ilsenmann and Vinyard called upon Eugene Schott the president of the Brewing Company. Schott drew up the following agreement which was signed by Vinyard and Grimm, Jr., the latter acting for his mother:

"September 6th, 1910.

This agreement entered into between Geo. Grimm and John Vinyard, both of New Douglas, Illinois. Geo. Grimm agrees to sell his father's saloon business in New Douglas, Illinois, to John Vinyard. And John Vinyard agrees to buy Geo. Grimm's saloon business. They both agree that the stock of goods shall be invoiced. Geo. Grimm to select one invoicer and John Vinyard to select one invoicer; if these two cannot agree they shall select the third; then all three shall appraise the stock. The furniture of the saloon shall be priced by John Vinyard and Geo. Grimm and the price shall be what they will agree upon. Mr. Geo. Grimm promises to pay the Highland Brewing Company $175.00 for the note which they hold against his father and John Vinyard shall pay the Highland Brew. Co. the

Mr. Eph Vinyard agrees to hold out the $125.00 of the amount of the invoice which Geo. Grimm agrees to pay the Highland Brewing Company, and Eph Vinyard agrees to pay the $125. to the Highland Brewing Company's agent, Mr. Peter Watts.

(Signed) Eph Vinyard
Geo. Grimm."

Lienemann then paid the $50 ~~provided in the contract to be paid by Vinyard~~ and the stock was ~~thereafter~~ invoiced by two persons selected as agreed, ~~upon~~. *

The questions of fact in dispute between the parties are as to the amount of the invoice as found by the parties selected to make it and also as to whether the $50 to be paid to the Brewing Company by Vinyard was or was not to be credited on the purchase price. † At the time of the trial both ~~of the~~ parties who made the invoice, were dead and the invoice ~~itself~~ was not ~~introduced~~ in evidence. ~~To determine the amount~~ there was no~~thing~~ evidence of the amount other than the facts and circumstances ~~shown to surround~~ of the case and the testimony of George Grimm, Jr., Lienemann and Vinyard. The former testified to have written down the articles and added up the amounts at which they were invoiced and that the total was $777. Lienemann and Vinyard testified that the total was $652, ~~while Vinyard said it was $652 as near as he could remember~~. The note sued on, for $252, was prepared at the request of Lienemann in the absence of George Grimm, Jr., and signed by Lienemann with A. B. Rockwell as surety. Lienemann also paid Grimm

[illegible] agree to lay out the $[illegible]

of the amount of the invoice which George Grimm

agree to pay the Hillsboro Sewing Company, and

[illegible] agree to pay the $125. to the High-

land Sewing Company's agent, Mr. Peter White.

(signed) Joh Vinyard

Witness.

Lienemann then paid the $50 provided in the contract

to be paid by Vinyard and the stock was there-

after invoiced by two persons selected as agreed,

[illegible].

The questions of fact in dispute between

the parties are as to the amount of the invoice as

found by the parties selected to make it and also

as to whether the $50 to be paid to the Sewing

Company by Vinyard was or was not to be credited on

the purchase price. At the time of the trial both

of the parties was made the invoice, sale deed and

the invoice itself was not introduced in evidence.

To determine the amount there was nothing other

than the facts and circumstances shown to surround

the case and the testimony of George Grimm, Jr.,

Lienemann and Vinyard. The former testified to have

written down the articles and added up the amounts

at which they were invoiced and that the total

was $177. Lienemann testified that the total was

$125, while Vinyard said it was $125 or more or

less, he could remember. The note sued on, in suit, was

prepared at the request of Lienemann in the absence

of George Grimm, Jr., and signed by Lienemann with

A. B. Hockwell as surety. Lienemann also paid Grimm

$400 ~~by a certificate of deposit~~ and afterwards paid the Brewing Company the $125 provided for in the agreement to be paid by Grimm. Grimm made out and executed for Lienemann the following writing, which he called a bill of sale: "This is to certify that G. H. Lienemann has paid $652. (six hundred and fifty two and 00/100 dollars) as full payment for stock of dram shop goods and fixtures belonging to estate of Geo. Grimm, Sr., deceased.

Geo. Grimm, Jr.
Mrs. Mary Grimm,
per Geo. Grimm, Jr."

It is to be observed that if the payment of $125 be deducted from $777, the amount of the invoice, the balance will be $652, which is the sum of the amount of $400 paid by Lienemann by the certificate of deposit and the note of $252 given by him. The proof also showed that Lienemann paid the $125 to Watts as agent for the Brewing Company before he gave the certificate of deposit and the note to Grimm and took a receipt from the latter for $652; and further that no demand was made by Lienemann that the amounts paid by him be credited upon the note until after the same was sent to the bank for collection. If as a matter of fact the invoice only amounted to $652 and Lienemann paid $400 to Grimm by certificate of deposit and was to have credit also for the $125 paid by him to the Brewing Company, then there only remained to be paid $125; and if Lienemann was to have further credit for the $50 paid by him on the contract, there would

$400 by certificate of deposit, and returned

paid the Brewing Company the $125 provided for

in the agreement to be paid by Grimm. Grimm made

out and executed for Lienemann the following writ-

ing, which he called a bill of sale: "This is to

certify that G. H. Lienemann has paid $652. (six

hundred and fifty two and 00/100 dollars) as full

payment for stock of drug shop goods and fixtures

belonging to estate of Geo. Grimm, Sr., deceased.

Geo. Grimm, Jr.
Ira. Mary Grimm,
per Geo. Grimm, Jr."

It is to be observed that if the payment of $125

be deducted from $777, the amount of the invoice,

the balance will be $652, which is the sum of

the amount of $400 paid by Lienemann by the certi-

ficate of deposit and the note of $252 given by

him. The proof also showed that Lienemann paid

the $125 to Watts as agent for the Brewing Company

before he gave the certificate of deposit and the

note to Grimm and took a receipt from the latter

for $652; and further that no demand was made by

Lienemann that the amounts paid by him be credited

upon the note until after the same was sent to the

bank for collection. If as a matter of fact the

invoice only amounted to $652 and Lienemann paid

$400 to Grimm by certificate of deposit and was to

have credit also for the $125 paid by him to the Brewing Company, then there only remained to be paid

$125; and if Lienemann was to have further credit

for the $50 paid by him on the contract, there would

remain only the sum of $77 to be paid, and no reason appears why the note should have been given under such circumstances for $252. If however, the claim of appellee is correct that the invoice was for $777, then as above shown the note was given for the correct amount, due her provided Liencmann was to have no credit for the $50 provided in the contract to be paid by him. Inregard to the sum of $50 provided in the contract to be paid by Vinyard to the Brewing Company, appellants claim that it was to be deducted from the invoice. The contract, however, does not provide that it should be so deducted and appellee claims that it was simply to be paid in furtherance of the trade. The testimony on the contested points was conflicting and not to be reconciled but the giving of the note does not appear to be consistent with appellant's theory of the case, while it is easy to be reconciled with the theory insisted upon by appellee. The note introduced in evidence made out a prima facie case in favor of appellee, and the burden was upon appellants to establish their theory of the case by a preponderance of the evidence.

The trial judge after hearing the testimony of the witnesses produced before him and considering all the evidence, arrived at the conclusion that appellants had not established their defense to the note as claimed and under all the circumstances we think his finding should be sustained. The judgment of the court below will be affirmed.

Affirmed.

Not to be reported in full.

regain only the sum of $77 to be paid, and no reason appears why the note should have been given under such circumstances for $282. If however, the claim of appellee is correct that the invoice was for $777, then as above shown the note was given for the correct amount, due her provided Hammann was to have no credit for the $80 provided in the contract to be paid by him. Interest to the sum of $30 provided in the contract to be paid by Vinyard to the Sewing Company, appellants claim that it was to be deducted from the invoice. The contract, however, does not provide that it should be deducted and appellee claims that it was simply to be paid in furtherance of the trade. The testimony on the contested points was conflicting and not to be reconciled but the giving of the note does not appear to be consistent with appellant's theory of the case, while it is easy to be reconciled with the theory insisted upon by appellee. The note introduced in evidence made out a prima facie case in favor of appellee, and the burden was upon appellants to establish their theory of the case by a preponderance of the evidence.

The trial judge after hearing the testimony of the witnesses produced before him and considering all the evidence, arrived at the conclusion that appellants had not established their defense to the note as claimed and under all the circumstances we think his finding should be sustained. The judgment of the court below will be affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of December, A. D. 1915.*

C. C. Johnson

Clerk of the Appellate Court.

OPINION

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Vol. 196

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	Eibel Corl	AW3+30
7/13/77	WR Tuber	236-5801
8/16/78	M Stimm	236-8552
7/22/82	A. Venet	580-1267

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